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No. 09-

IN THE

Supreme Court of the United States

KENZI NORIS ELIZABETH SNIDER,
Petitioner,

v.

SEUNG LEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a plaintiff can use an acquittal by a foreign tribunal to satisfy the favorable termination requirement in a *Bivens* malicious prosecution claim against an FBI Agent who coerced her confession in the United States, where that confession resulted in her extradition to the foreign country.

II. Whether a Fourth Amendment malicious prosecution claim is a cognizable *Bivens* action when a federal Agent coerces a defendant to falsely confess and uses that false confession to obtain an order for extradition.

PARTIES TO THE PROCEEDING

The Petitioner is Kenzi Noris Elizabeth Snider. Respondent is Sueng Lee, Federal Bureau of Investigation Agent.

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The opinion of the Fourth Circuit is reported at 584 F.3d 193. The district court's opinion is reported at 2008 U.S. Dist. LEXIS 19212.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . .

18 U.S.C. § 3184:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for

> under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered.
>
> * * * *
>
> If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

STATEMENT OF THE CASE

I. FACTUAL ALLEGATIONS

On March 18, 2001, several exchange students, including Miss Snider and Miss Penich, went to a bar in Itaewon, South Korea, where they met and socialized with a group of United States Army soldiers. Miss Snider and Miss Penich were the last among the group to leave the bar. Pet. App. 42a. By the time Miss Snider and Miss Penich left the bar, Miss Penich was intoxicated and required assistance returning to the hotel. *Id.* at 43a. Miss Snider helped Miss Penich to her room and then went to her own room to sleep. The next morning, on March 19, 2001, Miss Penich was found dead. She had been

stomped to death. *Id.* at 41a-42a. About a year later, despite a complete lack of physical evidence tying Miss Snider to Miss Penich's murder, Miss Snider was arrested for Miss Penich's murder and extradited to South Korea. After spending nearly ten months in United States' jail and six months in South Korean prison, Miss Snider was exonerated by the Seoul District Court, but then forced to remain in Korea for another eighteen months while awaiting appellate review of her case. *Id.* at 51a-52a.

Because of the violent nature of Miss Penich's death, the crime scene was very bloody. Despite the bloody scene, no blood or physical evidence was ever found on Miss Snider's clothing, in her room, or in the hallway leading to her hotel room. Pet. App. 71a. Additionally, following the murder, several witnesses reported seeing a man loitering in the hallway outside of Miss Penich's room, hearing a struggle coming from Miss Penich's room, and seeing a man leave the hotel with blood on his pants. *Id.* at 105a-107a.

Miss Snider, the soldiers, and the five other students traveling with Miss Penich were questioned during the initial investigation, but the Korean police made no arrests. Pet. App. 43a-44a. Given the absence of any evidence linking Miss Snider to the crime and the presence of evidence indicating a male perpetrator, the Korean police had no reason to suspect that Miss Snider murdered Miss Penich. *Id.* at 71a. Because the Korean authorities were unable to make any arrests, the FBI and the Korean government suffered intense political scrutiny for their failure to solve the crime. *Id.* at 73a-74a; *id.* at 107a-108a. The Korean investigation continued over the next several months, but with no demonstrable leads and no arrests. While Korean investigators

were struggling, FBI Agents Mark Mansfield and Seung Lee traveled to South Korea to assist the Korean authorities. *Id.* at 46a. Although Mansfield was part of the initial murder investigation in South Korea, Lee was new to the case. *Id.* at 45a-46a. Neither Lee nor Mansfield had ever investigated a homicide before. *Id.* After conducting some investigatory work in South Korea, the Agents returned to the United States. Nearly a year after Miss Penich's murder, in February 2002, Mansfield and Lee contacted Miss Snider and requested that she meet them at a Ramada Hotel in Huntington, West Virginia. *Id.* at 48a.

Prior to Miss Snider's interrogation, while looking through reports and statements, Mansfield noticed a large boot print on the back of a copy of Miss Snider's original statements to Korean police during the week of the murder. Pet. App. 46a. Hoping that the print was related to the content on the other side of the statements, thereby incriminating Miss Snider, Mansfield and Lee asked the Korean detectives who prepared the papers to explain the presence of the footprint. *Id.* at 46a. The detectives explained that the paper that the statement was written on had been used during boot print testing and then later reused to copy Miss Snider's statement. *Id.* Thus, the presence of the print on the statement was mere coincidence. Despite having no evidence implicating Miss Snider and because of the intense political pressure to solve the crime, Mansfield and Lee focused their investigation on Miss Snider and made plans to interrogate her. *Id.* at 73a-74a; *id.* at 107a-108a. In advance of their meeting with her, the Agents developed a "lesbian theory" of the crime, in which Miss Snider supposedly killed Miss Penich in a jealous, romantic rage. *Id.* at 95a-96a.

Based on their self-proclaimed "lesbian theory" and notwithstanding FBI Behavior Analyst Mark Safarik's suggestion that the killer was likely male, eyewitness accounts that likewise suggested a male perpetrator, and the complete lack of any physical evidence linking Miss Snider to the crime, Mansfield and Lee interrogated Miss Snider over the course of three days in February 2002. Pet. App. 47a.

On the first day of the interrogation, February 4, 2002, the Agents focused on building a rapport with Miss Snider; they led her to believe that the purpose of their meeting with her was so that she could help them solve her friend's murder. Pet. App. 78a; *id.* at 49a. Mansfield later described this as a friendly, "getting-to-know-you" session. *Id.* at 92a. Miss Snider was susceptible to such rapport-building tactics because she already knew Mansfield from the initial Korean investigation. *Id.* at 76a; *id.* at 92a. None of the sessions were audio or videotaped because the Agents were trained not to record interrogations. *Id.* at 100a-101a. Similarly, no log or notes were kept. *Id.* at 111a. Miss Snider brought a friend with her to the hotel; however, the Agents would not allow her to bring her friend into the interrogation room and took Miss Snider to another floor of the hotel, alone. *Id.* at 77a. Although the interrogation took place in Lee's hotel room, the Agents did permit Miss Snider to leave the room briefly to speak with her friend. *Id.*

At the end of the first day of the interrogation, the Agents asked Miss Snider to complete a "homework assignment," by writing down what she remembered of the events from the night of the murder. Pet. App. 49a. Miss Snider completed the assignment, and the statement indicated her innocence. *Id.*

On the second day of the interrogation, Miss Snider brought her "homework assignment" to the Agents, along with ice cream to share. Pet. App. 78a-79a. A few hours into this second questioning session, the Agents shifted tactics. Divittis moved to the bed where Miss Snider was sitting, and the Agents told Miss Snider that her account of the night of the murder was inconsistent. *Id.* at 80a.

When the interrogation became hostile, Miss Snider asked the Agents if she needed a lawyer. She stepped outside the room for about ten seconds and then reentered. Pet. App. 80a-81a. The Agents replied that a lawyer would make things harder on her because they would be unable to say that she cooperated with the investigation. *Id.* at 120a-121a. They recommended that she cooperate without a lawyer present. *Id.* Wishing to demonstrate her innocence and believing that contacting a lawyer would compromise her ability to do so, Miss Snider relented. *Id.* At that time, Lee and Mansfield placed themselves between Miss Snider and the door, blocking her ability to exit the room. *Id.* at 85a.

Next, the Agents discussed the phenomenon of "repression" with Miss Snider. Pet. App. 96a-98a. They also provided her with disturbing information and photos of the crime scene and asked her leading questions to help her "recall" repressed memories. *Id.* at 49a-50a. They hypothesized that there was a lesbian encounter between Miss Snider and Miss Penich that triggered the attack, though there was no evidence that either woman had any homosexual tendencies. *Id.* at 88a-89a. Though Miss Snider became visibly upset by the interrogation and maintained her innocence, the Agents yelled at her, called her a liar, and insisted that her inability to recall the murder was attributable to "repression."

Id. at 49a-50a. The Agents further misrepresented the potential penal consequences under Korean law, which included the death penalty: they told Snider that extradition to South Korea would be difficult and that the charged suspect would be treated leniently. *Id.* at 91a-92a; *id.* at 110a.

With the agent-fueled misrepresentation of the consequences of a confession, and after five hours of interrogation in which Miss Snider was no longer able to discern her true memories from those suggested to her by the Agents, she finally acquiesced and accepted the version of the murder proffered by the Agents. Pet. App. 92a-94a; *id.* at 50a. At no time during the interrogation was Miss Snider read her Miranda rights. *Id.* at 72a-73a.

After Miss Snider accepted the Agents' view of events, the Agents asked her to return for a third day of interrogation. Pet. App. 85a. After a sleepless night, Miss Snider returned and the Agents told her that they would like to get her confession in writing. *Id.*; *id.* at 121a. Mansfield handwrote the confession, which Miss Snider signed. *Id.* at 86a.

After Miss Snider's interrogation, an investigation was undertaken to find physical evidence linking Miss Snider to the murder. Miss Snider's DNA was not found on the body or at the crime scene. Pet. App. 83a-85a; *id.* at 87a. No blood stains were found on the clothing that Miss Snider wore on the night of the murder, even though she was wearing the same pants the night of the murder and the morning after the murder when Miss Penich's body was discovered. *Id.* at 99a-100a; *id.* at 122a-123a. While physical evidence implicating Miss Snider was never found, the investigation revealed semen in Miss Penich's underwear and Type B blood, the same as Miss Penich's, near the South Korean hotel's exit, even

though there was no evidence that Miss Snider left the hotel that night or was otherwise near the exit. *Id.* at 103a; *id.* at 71a. In addition, a blood Type A hair was found under Miss Penich's head, which did not match Miss Snider, Miss Penich, or Miss Penich's roommate. *Id.* at 104a.

On February 28, 2002, extradition proceedings were initiated before the United States District Court for the Southern District of West Virginia. Pet. App. 51a. Miss Snider was extradited on December 20, 2002. *Id.* Other than the confession, no evidence was developed or introduced tying Miss Snider to the murder. *Id.* at. 39a. In fact, during the hearing, expert witness Richard Ofshe testified that the prepared statement that Miss Snider signed was "deeply troubling," that it had "elements . . . that suggest strongly that it could be a false confession," and that there was a "lack of independent corroboration of [Miss Snider] having perpetrated the crime." *Id.* at 129a.

Miss Snider was acquitted by the Seoul District Court on June 19, 2003, and her acquittal was upheld both by the appeals court and by the Korean Supreme Court. Pet. App. 39a-40a.

II. PROCEEDINGS AND DECISIONS BELOW

On May 24, 2007, Miss Snider filed a complaint against Agents Divittis, Mansfield, and Lee in the United States District Court for the Southern District of West Virginia. Pet. App. 38a. In the complaint, Miss Snider alleged that the false confession elicited from her by the Agents resulted in her extradition to South Korea and her imprisonment for more than

fifteen months for a crime that she did not commit. *Id.* at 40a.[1]

Miss Snider stated five claims against the Agents: (1) a Fifth Amendment claim of coerced confession; (2) a Fifth Amendment claim for deprivation of the right to a fair trial, wrongful extradition, and wrongful imprisonment; (3) a Fifth Amendment claim for failure to intervene; (4) a Fourth Amendment claim for false imprisonment; and (5) a Sixth Amendment claim for denial of counsel. Pet. App. 41a-42a.

On March 10, 2008, the District Court dismissed all of the above claims on statute of limitations grounds, except for the Fifth Amendment claim for deprivation of the right to a fair trial, wrongful extradition, and wrongful imprisonment. Pet. App. 28a-47a.

Agent Lee filed a Motion to Dismiss, or in the alternative, for Summary Judgment on grounds of qualified immunity. The District Court denied the motion, reasoning that:

> Taking Plaintiff's version of the facts as true for this inquiry, there were psychological influences from the officers that resulted in her coerced confession; Plaintiff was entitled, but not permitted, to consult with an attorney; and the officers failed to intervene to protect her. These facts, if true, establish that Defendant Lee violated at least one constitutional right.

Pet. App. 36a-37a. The court further held that "officers are not entitled to coerce a confession, that

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[1] Defendants Divittis and Mansfield are not parties to this action because they were not served until very recently and were not part of the District Court or Fourth Circuit proceedings.

individuals in custodial interrogations are entitled to counsel, and that officers have a duty to intervene to protect certain individuals in circumstances where they may be harmed by another officer." *Id.* at. 37a. According to the court, Lee clearly "played a role in the initiation of the criminal proceedings" against Miss Snider, and Miss Snider "establishe[d] a basis for her claims" so that summary judgment was precluded. *Id.* at 46a.

The District Court found that, viewing the facts in the light most favorable to the Miss Snider, there were genuine issues of material fact as to whether Agent Lee violated Miss Snider's clearly established constitutional rights. Therefore, Agent Lee was not entitled to qualified immunity. Pet. App. 38a.

On October 6, 2009, the Fourth Circuit found that Lee was entitled to summary judgment on the basis of qualified immunity because Miss Snider failed to show a well-established constitutional violation. Without deciding if the Constitution guarantees a right to be free from malicious prosecution, the Court held that even if a malicious prosecution cause of action exists, Miss Snider failed to make out a valid claim because she failed to show that she met one element of the cause of action: "favorable termination of the criminal proceeding flowing from the seizure." Pet. App. 12a. The Court rejected Miss Snider's argument that her acquittal by the South Korean Supreme Court served as the favorable termination of the criminal proceeding flowing from her seizure in the United States. The court instead found that:

> [T]he extradition hearing did *not* terminate in Snider's favor [and] [i]t is the extradition proceeding to which we must look for determining whether Snider was successful for purposes of a malicious prosecution claim under

> the Fourth Amendment because her seizure was effected only for the purpose of conducting the extradition hearing.

Pet. App. 16a (emphasis in original).

Concurring in judgment only, Judge Stamp accepted Miss Snider's argument that her acquittal in South Korea constituted favorable termination of the criminal proceeding against her. Judge Stamp noted that viewing Miss Snider's arrest as solely for the purpose of the extradition hearing was "an overly narrow characterization of the reasons underlying Snider's seizure" and that "the extradition hearing was merely a means of prosecuting the broader criminal action against Snider." Pet. App. 20a (Stamp, J., concurring).

SUMMARY OF THE ARGUMENT

The Fourth Circuit erred by holding that the extradition order constituted a "final judgment" that terminated the criminal proceeding against Miss Snider. Pet. App. 16a. Although a foreign tribunal acquitted Miss Snider of all charges, the Fourth Circuit nevertheless held that she could not satisfy the "favorable termination" requirement of a *Bivens* malicious prosecution claim. These holdings diverge from Second, Third, Seventh, Ninth and Eleventh Circuit precedent regarding the character and scope of extradition proceedings. Furthermore, the Fourth Circuit's decision misunderstands the nature of extradition hearings. An extradition order merely constitutes a finding of probable cause and does not

terminate the criminal proceeding.[2] The Fourth Circuit's holdings also disregard the fundamental purpose of the favorable termination requirement of a malicious prosecution claim: to prevent people from challenging guilty verdicts through malicious prosecution civil suits. *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994). Because Miss Snider was acquitted, she is not challenging a guilty verdict through a malicious prosecution claim. Therefore, the extradition order should not prevent her from seeking redress for violations of her constitutional rights. Under the Fourth Circuit's logic, government Agents may coerce confessions from American citizens without fear of malicious prosecution as long as those citizens are tried outside the United States.

This case also provides this Court with the opportunity to clarify the scope of a federal malicious prosecution cause of action. In *Wallace* v. *Kato*, this Court declined to take a position on the validity of malicious prosecution claims under § 1983. 549 U.S. 384, 390 n.2 (2007). As a result, the law of malicious prosecution varies drastically by circuit, with half the circuits recognizing a federal malicious prosecution cause of action. Although federal law provides causes of action for constitutional violations similar to malicious prosecution, none of these claims provides remedy for the entire length of detention or incarceration. A federal malicious prosecution cause of action is thus necessary to supplement these remedies. See *Heck*, 512 U.S. at 484 (stating that malicious prosecution "permits damages for confinement imposed pursuant to legal process").

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[2] An order denying extradition would clearly be a favorable termination since it would end the criminal proceedings and establish that not even probable cause exists.

The Court should use this opportunity to clarify the requisite elements of a federal malicious prosecution claim. Because the prevalence of extradition hearings will continue to affect a large number of citizens, this Court should find that extradition orders do not constitute an unfavorable termination in a malicious prosecution claim.

ARGUMENT

I. THE FOURTH CIRCUIT'S HOLDING THAT THAT AN ORDER OF EXTRADITION QUALIFIES AS A FINAL JUDGMENT THAT ACTS AS A TERMINATION OF CRIMINAL PROCEEDINGS IS IN CONTRAVENTION OF THIS COURT'S LOGIC IN *HECK* V. *HUMPHREY*, AND AT LEAST FIVE OTHER CIRCUITS.

The Fourth Circuit's decision diverges from Second, Third, Seventh, Ninth, and Eleventh Circuit precedent regarding the character and scope of extradition proceedings. The Fourth Circuit held that a defendant acquitted by a foreign tribunal is barred from bringing a malicious prosecution claim because an order of extradition is a "final judgment" constituting an unfavorable termination of criminal proceeding. This holding misstates the purpose of an extradition order, which does not terminate the criminal proceeding. Review by this Court is warranted to correct the circuit split created by the Fourth Circuit's decision.

Malicious prosecution generally requires a plaintiff to show four elements: "(1) the defendant initiated of maintained a criminal proceeding; (2) the criminal proceeding terminated in plaintiff's favor; (3) the proceeding was not supported by probable cause; and

(4) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding." Pet. App. 17a (Stamp, J., concurring). The favorable-termination requirement of the underlying criminal proceeding is the threshold issue for a malicious prosecution claim. *Janetka* v. *Dabe*, 892 F.2d 187, 189 (2d Cir. 1989). This requirement prevents plaintiffs from challenging a guilty verdict through a civil suit. *Heck*, 512 U.S. at 485. The relevant inquiry for this element of a malicious prosecution claim is the termination of the entire criminal proceeding. See *Kossler* v. *Crisanti*, 564 F.3d 181, 188 (3d Cir. 2009). Terminations are favorable where "their final disposition is such as to indicate the accused is not guilty." *Singleton* v. *City of New York*, 632 F.2d 185, 193 (2d Cir. 1980); see also Restatement (Second) of Torts § 660 cmt. a (1977). Terminations are unfavorable only where they tend to indicate guilt. See *Singleton*, 632 F.2d at 193; *Kossler*, 564 F.3d at 187.

Unlike a final judgment, an extradition order continues, rather than terminates, the criminal proceeding. The purpose of an extradition hearing is not to adjudicate the merits of the case, but rather to determine whether there is probable cause to prosecute. Despite the preliminary nature of such hearings, the Fourth Circuit held that an extradition order is a "final judgment." Pet. App. 16a. The Court further held that "because [Miss Snider's] seizure was effected only for the purposes of conducting the extradition hearing," the extradition proceeding was the relevant inquiry for purposes of a malicious prosecution claim. *Id.* In the extradition hearing, the magistrate judge found probable cause and ordered Miss Snider's extradition. The Fourth Circuit held that the extradition order constituted an unfavorable

"final judgment" that barred Miss Snider's malicious prosecution claim, despite her ultimate acquittal in South Korea. Although the Fourth Circuit correctly noted that final judgments are appropriate rulings for the favorable termination requirement, it departed from other circuits in holding that extradition orders constitute final judgments.

The Second, Third, Seventh, Ninth, and Eleventh Circuits have specifically stated that extradition orders do not constitute final judgments. *Jhirad* v. *Ferrandina*, 536 F.2d 478, 482 (2d Cir. 1976); *Matter of Assarsson*, 635 F.2d 1237, 1246-47 (7th Cir. 1980); *Hooker* v. *Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978); *Hoxha* v. *Levi*, 465 F.3d 554, 560 (3d Cir. 2006); *Noel* v. *United States*, 12 F. Supp. 2d 1300, 1302 (M.D. Fla. 1998), *aff'd* 180 F.3d 274 (11th Cir. 1999). As the Ninth Circuit has stated, an extradition hearing "signals the start, rather than the conclusion, of litigation of the fugitive's guilt or innocence. As opposed to a *final judgment*, it is truly an interlocutory order, more akin to a preliminary hearing on criminal charges." *Hooker*, 573 F.2d at 1367 (emphasis added). Furthermore, "it cannot be said that an order of extraditability constitutes a final judgment for purposes of res judicata," nor for purposes of *18 U.S.C. § 3184*. *Id.* at 1368; see also *Caplan* v. *Vokes*, 649 F.2d 1336, 1340 (9th Cir. 1981) ("Because a certification of extraditability is not a 'final order,' no direct appeal lies from that decision.").

Because the vast majority of circuits have recognized that extradition proceedings do not determine guilt or innocence, are *sui generis*, are not appealable, and do not use procedural safeguards present at trials, the Fourth Circuit erroneously concluded that the extradition hearing was the

"termination of the criminal proceeding" that defeated Miss Snider's claim for relief. Because extradition hearings do not determine the guilt or innocence of the accused, an extradition order is neither a final judgment nor a termination of the criminal proceedings. *Assarsson*, 635 F.2d at 1246; *Hooker*, 573 F.2d at 1367. The Seventh Circuit noted that an extradition order "does not constitute a *final judgment* on the guilt or innocence of the accused." *Assarsson*, 635 F.2d at 1246-47 (emphasis added). Instead, the purpose of extradition hearings is limited to determining "whether there is 'competent legal evidence which . . . would justify [the accused's] apprehension and commitment for trial if the crime had been committed in [the forum] state.'" *Hooker*, 573 F.2d at 1367 (quoting *Collins* v. *Loisel*, 259 U.S. 309, 315, (1922)). This Court has likewise acknowledged that an extradition hearing requires only a showing of probable cause. *Benson* v. *McMahon*, 127 U.S. 457, 462-63 (1888). See also *Collins* v. *Loisel*, 259 U.S. 309, 314-15 (1922); *Charlton* v. *Kelly*, 229 U.S. 447, 458 (1913); *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925).

However, the Fourth Circuit concluded that an extradition order to a foreign tribunal is an unfavorable termination of the criminal proceeding, even where the defendant is acquitted. In essence, the Fourth Circuit conflated extradition with a finding of guilt for purposes of a malicious prosecution claim, a conclusion that is inconsistent with the decisions of all the circuits to have addressed the issue.

Moreover, extradition hearings cannot terminate a criminal proceeding because they are not criminal in nature. The Second, Ninth, and Eleventh Circuits have found that extradition hearings are *sui generis*,

neither civil nor criminal. See *Jhirad*, 536 F.2d at 482; *United States* v. *Kirby*, 106 F.3d 855, 867 (9th Cir. 1996); *Martin* v. *Warden*, 993 F.2d 824, 828 (11th Cir. 1993). Instead, extradition proceedings are an executive function for which "the judiciary serves [as] an independent review." *Martin*, 993 F.2d at 828.

Additionally, extradition orders cannot serve as final judgments that terminate a criminal proceeding because they cannot be appealed. This Court has long recognized that extradition orders are not appealable. *Benson*, 127 U.S. at 462-63. Because any state, federal, or magistrate judge may issue extradition orders, such orders "do not . . . constitute 'final decisions of a district court'" and are not "appealable as of right under 28 U.S.C. § 1291." *Jhirad*, 536 F.2d at 482; see also *Sidali* v. *INS*, 107 F.3d 191, 195 (3d Cir. 1997) (same).

Moreover, because extradition hearings do not provide the procedural protections afforded at trial, they cannot render final judgments that terminate criminal proceedings. This Court has discussed the procedural differences between extradition hearings and trials. See *Charlton*, 229 U.S. at 462; *Bingham* v. *Bradley*, 241 U.S. 511, 517 (1916). Individuals subjected to extradition hearings are not entitled to cross examine witnesses. *Id.* Evidence generally inadmissible in a criminal proceeding can be introduced. *United States* v. *Lui Kin-Hong*, 110 F.3d 103, 119 (1st Cir. 1997). The magistrate also may exclude evidence of the accused's potential defenses. *Charlton*, 229 U.S. at 461-62. These procedural deficiencies reveal that extradition hearings do not allow courts to consider the merits of the case because the hearings are intended to serve as the first stage of the criminal proceeding.

Unlike decisions from other circuits, the Fourth Circuit's decision in *Snider* does not recognize the lack of procedural protections inherent in extradition hearings. As Judge Stamp' concurrence noted, "[the majority] does not seem . . . to acknowledge the circumscribed purpose of an extradition hearing and the limited ability of a defendant to challenge the evidence presented against him or her in such a proceeding." Pet. App. 21a. It was thus error for the Fourth Circuit to fail to recognize that the procedural deficiencies inherent in extradition hearings indicate that they do not constitute final judgments in criminal proceedings.

Despite the limited and unique nature of extradition proceedings, the Fourth Circuit deemed the extradition hearing a "trial" and held that an order of extradition is a final judgment. Pet. App. 16a. The Fourth Circuit reasoned that extradition orders constitute final judgments because, after the certification by the judicial officer and Secretary of State, the case is outside the jurisdiction of the United States judiciary. *Id.* Such a conclusion is inconsistent with the numerous cases holding that extradition hearings do not determine guilt or innocence; are *sui generis*; are not appealable; and do not afford the same procedural safeguards available at trial. Consequently, the Fourth Circuit erred in holding that an extradition order is a final judgment that unfavorably terminates the criminal proceeding.

Review by this Court is warranted to correct the circuit split and the Fourth Circuit's error. Without clarification from this Court, the constitutional rights of the many United States citizens subject to extradition hearings will remain unclear and circumscribed. Additionally, without guidance from this Court, an extradition order can serve as

immunity from malicious prosecution claims because extradited individuals can never satisfy the favorable termination requirement. The decision regarding whether extradition orders constitute final judgments also has broad implications, as it may also apply to rendition or interstate extradition.

Finally, the principle of comity of nations also counsels that courts recognize the validity of the judgment of a foreign tribunal in this context. See *Am. Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909) ("For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."). Thus, the Fourth Circuit erred when it failed to recognize the validity of Miss Snider's acquittal in South Korea for purposes of a malicious prosecution claim.

II. THIS COURT SHOULD FIND FOURTH AMENDMENT MALICIOUS PROSECUTION CLAIMS VALID.

A. This Court Has Not Decided the Validity or Scope of a Fourth Amendment Malicious Prosecution Claim.

This case demonstrates the need for the Supreme Court to recognize a malicious prosecution cause of action. In *Wallace* v. *Kato*, this Court declined to take a position on the validity of malicious prosecution claims under § 1983. 549 U.S. at 390 n.2. Consequently, although almost every circuit court has recognized some form of malicious prosecution, the elements necessary to prove the claim vary by

circuit. This case provides the Court with the opportunity to clarify the law regarding malicious prosecutions.

The *Wallace* decision did not reconcile the diversity of views left by the six opinion plurality of *Albright* v. *Oliver*, 510 U.S. 266 (1994). Although the Court has not opined on whether the Fourth Amendment provides a *Bivens* claim for malicious prosecution, the Court has said that the common law of torts "provide[s] the appropriate starting point for the inquiry under § 1983." *Heck*, 512 U.S. at 483 (citation omitted). Malicious prosecution has long been recognized by the common law. *Id.* The Court in *Heck* analogized the petitioner's claim to a claim for malicious prosecution because the petitioner, filing *pro se*, raised a § 1983 violation by a state investigator who allegedly destroyed exculpatory evidence. Since the alleged conduct was wrongfully instituted legal process, not a lack of legal process, the Court found malicious prosecution the best analogy. *Id.* at 484-85. Although the Court did not find that the petitioner had a successful claim for malicious prosecution because his conviction had not been overturned, it discussed whether the facts fit into the malicious prosecution framework. The Court held that a conviction must be reversed, expunged or declared invalid in order to bring a federal civil action for allegedly unconstitutional imprisonment—in essence, a favorable termination requirement. *Id.* at 489. Furthermore, this Court recognized the widespread acceptance of malicious prosecution claims in *Albright* v. *Oliver*. 510 U.S. 266, 271 (1994).

Although this Court has not yet recognized a Fourth Amendment malicious prosecution claim, many circuit courts have identified a Fourth Amendment malicious prosecution claim. See

Roberts v. *Babkiewicz*, 582 F.3d 418 (2d Cir. 2009); *McKenna* v. *City of Philadelphia*, 582 F.3d 447 (3d Cir. 2009); *Harris* v. *Bornhorst*, 513 F.3d 503 (6th Cir. 2008), *cert. denied*, 128 S. Ct. 2938 (2008); *Lassiter* v. *City of Bremerton*, 556 F.3d 1049 (9th Cir. 2009); *Wilkins* v. *DeReyes*, 528 F.3d 790 (10th Cir. 2008); *Kjellsen* v. *Mills*, 517 F.3d 1232 (11th Cir. 2008). However, the Fourth Circuit has not yet incorporated malicious prosecution into federal law.

B. A Federal Malicious Prosecution Claim Is Necessary to Protect People Who Are Injured Due to the Wrongful Initiation of Legal Process.

A federal Fourth Amendment malicious prosecution claim would apply to events such as rendition and state extradition and would enable citizens to assert their constitutional rights.

Federal law, through *Bivens*, provides causes of action for constitutional violations similar to malicious prosecution, such as false imprisonment and false arrest. Section 1983 and *Bivens* actions are specifically designed to provide a remedy when the acts of a public official violate a person's constitutional rights. *Baker* v. *McCollan*, 443 U.S. 137, 142 (1979). The proscriptions against malicious prosecution and false arrest result from the same policy interest in protecting people from unconstitutional conduct by state and federal agents. Because the Court already recognizes false arrest as a constitutional violation, the Court should likewise recognize malicious prosecution as a constitutional tort.

This Court has recognized that malicious prosecution, false arrest, and false imprisonment

implicate different but equally important constitutional rights:

> Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held *pursuant to such process*—when, for example, he is bound over by a magistrate or arraigned on charges. . . . Thereafter, unlawful detention forms part of the damages for the "entirely distinct" tort of malicious prosecution, which remedies detention accompanied, not by absence of legal process, but by *wrongful institution* of legal process.

Wallace, 549 U.S. at 389-90 (emphasis in original; citations omitted). A malicious prosecution cause of action would provide remedy for constitutional violations for the duration of the legal process. Because false arrest and false imprisonment claims only require a showing that legal process was not followed, such claims can only provide damage awards for the time of detention before arraignment or issuance of process. Likewise, a claim for abuse of process is "limited to the harm caused by the misuse of process, and does not include harm . . . resulting from that process's being carried through to its lawful conclusion." *Heck*, 512 U.S. at 486 n.5. A malicious prosecution cause of action would provide remedy for the entire length of detention or incarceration. See *id.* at 484.

As Judge Posner in the Seventh Circuit has commented, "it is shocking to think that a police frame-up which lands a person on death row is not a constitutional tort, though every false arrest made without probable cause is." *Gauger* v. *Hendle*, 349 F.3d 354, 359 (7th Cir. 2003).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 3, 2010

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1414

KENZI NORIS ELIZABETH SNIDER,
Plaintiff-Appellee,

v.

SEUNG LEE, Federal Bureau of Investigation Agent,
Defendant-Appellant,

and

MARC DIVITTIS, Federal Bureau of Investigation Agent; MARK MANSFIELD, United States Army Criminal Investigation Division Agent; UNITED STATES OF AMERICA,
Defendants.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington.
Robert C. Chambers, District Judge.
(3:07-cv-00335)

Argued: May 12, 2009
Decided: October 6, 2009

Before NIEMEYER and MICHAEL, Circuit Judges, and Frederick P. STAMP, Jr., Senior United States District Judge for the Northern District of West Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Michael joined. Senior Judge Stamp wrote a separate opinion concurring in the judgment.

COUNSEL

ARGUED: Catherine Yvonne Hancock, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. J. Samuel Tenenbaum, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, Chicago, Illinois, for Appellee.

ON BRIEF: Gregory G. Katsas, Assistant Attorney General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Charles T. Miller, United States Attorney, Charleston, West Virginia, Barbara L. Herwig, Joshua Waldman, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Fletcher B. Brown, Christopher C. Colon, Jamie L. Owen, Senior Law Students, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, Chicago, Illinois; Deirdre H. Purdy, Chloe, West Virginia, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

The district court denied FBI Agent Seung Lee qualified immunity in connection with his investiga-

tion and interrogation of Kenzi Snider for the murder of a fellow exchange student, Jamie Penich, in Seoul, South Korea. During Lee's interrogations, Snider repeatedly confessed to the murder. When South Korea requested extradition, a hearing was conducted in the United States before a magistrate judge, who rejected Snider's claim that her confessions were coerced and concluded that probable cause existed for her extradition. The Secretary of State then extradited Snider to South Korea for trial.

After Snider was acquitted by South Korean courts, she commenced this *Bivens*[1] action against Lee and others for an array of constitutional violations, all of which the district court dismissed except for Snider's Fourth Amendment claim for malicious prosecution based on her allegation of "wrongful extradition."

Because Snider did not identify, in the circumstances of this case, a well-established constitutional violation, we conclude that Agent Lee is entitled to qualified immunity and reverse.

I

On March 17, 2001, Kenzi Snider and Jamie Penich, American exchange students in South Korea, returned together to their hotel rooms in the Itaewon region of Seoul, South Korea, after socializing in a local bar with fellow students and U.S. Army personnel. Because Penich was intoxicated and unable to walk on her own, Snider assisted Penich back to her hotel room.

The next morning, Penich was found naked and dead in her room. The evidence showed that she had been stomped to death, and the South Korean coroner

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[1] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

concluded that she had died from suffocation. South Korean police questioned the group of students, including Snider, but did not make any arrests. The evidence at the time suggested that Penich was murdered by one or two men, but that evidence was inconclusive, and the investigation languished. Snider returned to the United States and enrolled in Marshall University in Huntington, West Virginia.

In the face of demands from Penich's family and political pressure, agents of the FBI stationed in Korea, including Agent Seung Lee, joined the investigation. In reviewing the statements taken at the time of the murder, the agents became concerned about discrepancies between Snider's statements and the physical layout of the hotel room where Penich had been found, as well as the statements given by other students in the group. Based on their suspicions that Snider was not being completely truthful about her actions that night, Agents Mark Mansfield and Lee, as well as FBI polygrapher Mark DiVittis, traveled to Huntington, West Virginia, in February 2002 to speak with Snider.

The agents contacted Snider and invited her to come to the hotel where they were staying to answer some questions. Snider agreed to meet with the agents, and she set the time for the meeting, to take place on February 4, 2002. When Snider arrived at the hotel with a friend, the agents requested that the friend remain downstairs while the agents spoke with Snider in Agent Lee's hotel room, and Snider agreed.

At this first interrogation session—which all parties described as very friendly—the agents made clear that they were investigating Penich's murder and stated that extradition of Penich's killer to South

Korea would be difficult. They also cited cases where murders of Korean citizens by foreign nationals resulted in light sentences. Snider felt sufficiently comfortable to share with the agents that she had not been sleeping well since the murder and that she had been having strange dreams, including one about being attacked by a train and a shark at the same time. Agent DiVittis suggested to Snider that dreams about trains indicate sexual conflict. After three hours, the session ended, and Snider agreed to return the next day at a time of her choosing and to bring with her a written summary of what she remembered from the night of Penich's murder.

The next day, February 5, 2002, Snider arrived again at Agent Lee's room and brought homemade ice cream to share with the agents. In response to the agents' inquiry about her relationship with Penich, Snider stated that the two were close friends and that Penich had even confided in Snider that she was anorexic. Snider then gave the agents the hand-written statement that she had prepared the night before. This statement was generally consistent with her earlier statement given at the time of the murder but contradicted some details. When asked about the discrepancies, Snider explained that her present statement was different from her previous statement because she "didn't remember [the additional details] at the time."

Agent DiVittis then confronted Snider, telling her that the investigation showed that she murdered Penich. In making this accusation, however, DiVittis allowed how Snider probably "didn't mean to" and that perpetrators often "hide a memory and cover it up with another one" so that they can "handle it."

Snider became upset by the accusation and left the room. A moment later, however, she returned.

After she returned to the room, Snider asked the agents if she needed an attorney. The agents told her that a lawyer would just complicate things and that if she had an attorney, they would not be able to say that she had fully cooperated. Snider did not bring up the subject of an attorney again. The agents then suggested that Snider was repressing her true memories of the night. But before asking additional questions, they asked her, "Do you want to do this?" Snider indicated that she was willing to answer additional questions. When Agent DiVittis asked Snider about her emotions towards Penich, Snider stated that although she did not feel lustful toward other women, she had become excited when Penich undressed in front of her on the night of the murder. Agent DiVittis then asked Snider to recount step-by-step her actions on the night of the murder.

Snider, now sitting in a chair hunched over with her eyes closed, began to confess in detailed fashion how she murdered Penich. She recounted a sexual encounter with Penich that resulted in Snider becoming angry, striking Penich, and then killing her by stomping on her head. Agents prompted Snider whenever she would pause by asking "What did you do then?" or "How did you move the body?" or "What set you off in a panic?" Several of the details provided by Snider corresponded to what the agents knew about the evidence at the crime scene. They noted that the bruising on Penich's face was consistent with Snider's confession that she slapped Penich; that the bruising on Penich's back was consistent with Snider's confession that she dropped Penich on the bathtub; and that the way Penich's clothes were

arranged on the floor corresponded with Snider's story that Penich had undressed seductively in front of her, removing both jeans and under-wear at the same time. This statement contradicted Snider's earlier statement that she had left Penich alone in the hotel room dressed only in her underclothes. Snider also now stated that she returned to her hotel room only once that night, contrary to her earlier statement but consistent with the testimony of her roommate. Snider concluded her statement to the agents by saying that she locked the door to her hotel room that night in order to lock out the bad thoughts of the murder.

The three agents then left the room for a moment. When they returned, Snider, without prompting, gave them additional details of the murder. When the agents asked if she would come back the next day to make a formal statement, she agreed and again set the time for the meeting. The agents then followed Snider home to retrieve the clothing that she was wearing on the night of the murder and departed.

The next day, February 6, 2002, Snider returned to the hotel room as agreed and again recounted the sexual encounter and subsequent murder, adding additional details that she "remembered" the night before. The agents wrote a summary of her confession, which Snider then read and signed. The statement specifically noted that Snider had not been promised anything or threatened by the agents. Before she left, the agents fingerprinted and photographed her and told her not to leave the State without permission. Snider thereafter withdrew from school.

Several weeks later, on the petition of South Korea and at the request of the State Department, Snider was arrested and taken into custody. At the time, she

signed a *Miranda* waiver and repeated the same confession to her arresting officers that she had given at the hotel room to the agents questioning her then.

At the extradition hearing, Snider testified for the first time that Agents Mansfield, Lee, and DiVittis had coerced her. She stated that she did not believe that her confession was based on true memories and that she was "not confident" that her statements about the night of the murder were accurate. Snider asserted that, because the agents challenged her version of the events that night, as well as her memory of them, she had simply tried to find the right memories. When asked why she never retracted the confession, even after being arrested, Snider stated that she did not know that retraction was an option. Finally, when asked if she murdered Penich, Snider stated, "Not by the memories I hold true." She never asserted unequivocally that she did not murder Penich.

At the extradition hearing, Snider also produced an expert on coerced confessions, who testified that introducing any discussion of punishment into the interrogation increases the chance of a false confession. He also stated that this tactic of interrogation "may create false confessions." The expert admitted that his opinion and studies were based on observations and that there were no controlled experiments to verify his hypothesis. When asked specifically about Snider's confession, the expert stated that his examinations of the record "suggest strongly that it could be a false confession." The expert also stated that the confession was "more likely to be the product of influence than the product of the actual experiences of having been there."

At the conclusion of the evidence, the magistrate judge conducting the extradition hearing concluded

that "the evidence presented does not establish that Ms. Snider's will was 'overborne' or that her 'capacity for self-determination [was] critically impaired' by the manner in which she was interrogated." (Citation omitted). Based on Snider's confessions, their internal corroboration, and their corroboration by the other evidence, the judge concluded that there was probable cause to believe that Snider murdered Penich. The judge certified his findings and the evidence to the Secretary of State, who, pursuant to an extradition treaty between South Korea and the United States, elected to extradite Snider to South Korea. Snider did not challenge the extradition order.

Following trial in South Korea, Snider was acquitted by the Seoul District Court on June 19, 2003, and the acquittal was upheld by appellate courts, including, on January 13, 2006, the South Korean Supreme Court.

Snider commenced this *Bivens* action on May 24, 2007, alleging a variety of constitutional and state law claims. The district court dismissed all of her claims except for a claim for malicious prosecution because they were barred under the applicable statute of limitations. The court concluded that because the last element of her malicious prosecution claim—that Snider succeed in the criminal proceeding—occurred within two years of the filing of the complaint, the malicious prosecution claim was not time-barred. The district court also concluded that Agent Lee was not protected by qualified immunity. From the order denying qualified immunity on the malicious prosecution claim, Agent Lee filed this appeal.

II

The doctrine of qualified immunity protects government officials from civil damage actions to the extent that the officials do not violate clearly established constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Officials have qualified immunity either if the facts do not make out a violation of a constitutional right or if the right was not clearly established at the time. In this case, we need address only the first question, whether the plaintiff made out a violation of a constitutional right based on the facts submitted. *See Pearson v. Callahan*, 129 S. Ct. 808, 815-16, 818-19 (2009).

In her complaint, Snider alleged that during the interrogations, Agent Lee manipulated her into giving a false confession by using misleading statements about the "psychological repression" of memory, by denying her the right to a lawyer, and by understating the consequences of a confession under South Korean law. She claimed that this conduct violated her rights under the Fourth and Fifth Amendments to be free from unreasonable seizures (including false arrest and false imprisonment), coercion leading to her confessions, the failure of government officials to intervene in the face of wrongful conduct, denial of counsel, and malicious prosecution (alleged as "wrongful extradition").[2]

On Agent Lee's motion, the district court dismissed all of Snider's claims against Lee except her claim for

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[2] Snider captioned Count II of her complaint as "Deprivation of Right to Fair Trial, Wrongful Extradition and Wrongful Imprisonment" under the "5th Amendment." The district court concluded that this count should best be taken as a claim for malicious prosecution under the Fourth Amendment, and Snider accepts that view.

malicious prosecution. And with respect to the claim for malicious prosecution, the district court denied Agent Lee's claim of qualified immunity, without addressing the specific reasons for doing so, although the court did refer to the fact that Snider's rights to counsel, to "intervention," and to be free from coercion "were clearly established."

Snider devotes most of her brief to arguing that these facts, particularly the alleged coercion, justify her claim of wrongful seizure under the Fourth Amendment because her seizure was not supported by probable cause. She reasons that Agent Lee improperly coerced a confession to create the probable cause and that, absent the confessions, there was no other evidence to support her arrest. But Snider cannot rely solely on the unreasonableness of her seizure even though her substantive allegations with respect to her seizure might amount to a violation of the Fourth Amendment. The district court already concluded that Snider's time for bringing her claims based on a wrongful seizure alone has long passed. Snider was arrested for extradition on February 28, 2002, and therefore should have brought any allegations of improper arrest or wrongful seizure within two years of that date. Yet she did not file her complaint in this action until May 24, 2007, over five years after her arrest.

To avoid the limitations issue, Snider alleges malicious prosecution, of which wrongful seizure is only an element. To satisfy the other element, she relies on her acquittal in the trial in South Korea.

While it is not entirely clear whether the Constitution recognizes a separate constitutional right to be free from malicious prosecution, *see Albright v. Oliver*, 510 U.S. 266, 279- 80 n.5 (1994) (Ginsburg, J.,

concurring); *Lambert v. Williams*, 223 F.3d 257, 261-62 (4th Cir. 2000), if there is such a right, the plaintiff must demonstrate both an unreasonable seizure and a favorable termination of the criminal proceeding flowing from the seizure. In *Lambert* we explained:

> Our analysis in *Brooks* [*v. City of Winston-Salem*, 85 F.3d 178 (4th Cir. 1996)], understood in light of these precedents, makes clear that there is no such thing as a "§ 1983 malicious prosecution" claim. What we termed a "malicious prosecution" claim in *Brooks* is simply a claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution—specifically, the requirement that the prior proceeding terminate favorably to the plaintiff.

223 F.3d at 262. In a footnote, we explained the significance of the second element of a malicious prosecution claim:

> As we noted in *Brooks*, the significance of the favorable termination element is not only that *it constitutes a prerequisite for recovery*, but also that it establishes the time from which the claim accrues for purposes of determining whether the statute of limitations has run.

Id. at 262 n.3 (emphasis added).

In short, even though Snider is time-barred from pursuing a claim for wrongful seizure under the Fourth Amendment, she is free to pursue a claim under the Fourth Amendment that has two elements—a wrongful seizure and a termination in her favor of the proceedings following her seizure. For the first element, Snider alleges that Agent Lee's conduct—obtaining coerced confessions from her—improperly established

probable cause for her arrest for the purpose of extradition to South Korea. And for the second element, she alleges that the criminal proceedings in South Korea terminated in her favor.

While Snider appropriately recognizes that "the criminal proceeding [following her seizure] must have terminated in [her] favor," she assumes without further discussion that the Korean acquittal satisfies this second element. Such an assumption, however, presumes that any protection under the Fourth Amendment against malicious prosecution extends to a prosecution in a foreign nation. Yet, Snider's constitutional rights are not so far-reaching.

Snider's seizure in the United States was effected by United States law enforcement officers, acting on a warrant issued pursuant to a complaint for extradition initiated at the request of Korea. She was not arrested to be tried for murder in the United States; rather, she was arrested to be subjected to an extradition hearing, the only U.S. judicial proceeding that occurred. Following that hearing, the U.S. judicial officer certified probable cause to the Secretary of State, who, acting under treaty and under statutorily conferred discretion, transferred Snider from the United States to South Korea for trial.

Extradition of a U.S. citizen to a foreign nation is an act of the Executive Department pursuant to a treaty between the United States and that foreign nation, *see* 18 U.S.C. § 3181(a), and a citizen of the United States may be extradited only upon the discretion of the Secretary of State, *id.* § 3186. "In deciding whether to extradite, the Secretary may consider factors affecting both the individual defendant as well as foreign relations—factors that may be beyond the scope of the . . . judge's review." *Mironescu*

v. Costner, 480 F.3d 664, 666 (4th Cir. 2007) (internal quotation marks and citation omitted).

To be sure, before the Secretary of State considers extradition, the citizen is tried before a U.S. judicial officer on a complaint filed under oath, but the trial is conducted only to determine whether "the evidence of criminality" is "sufficient to sustain the charge under the provisions of the proper treaty." 18 U.S.C. § 3184. If the judicial officer finds sufficient cause, the officer certifies that fact to the Secretary of State and transmits to the Secretary all of the evidence in the proceedings, *id.*, and with that the U.S. judicial proceeding ends.

The process before the judicial officer on the extradition complaint is the judicial process that the United States affords a citizen being extradited, and after extradition, the citizen is tried under the laws of the foreign nation. The arrest of the citizen in the United States is made on a warrant issued after the complaint of extradition is filed to compel the citizen to attend the extradition hearing. *See* 18 U.S.C. § 3184 (authorizing "warrant for the apprehension of the person so charged [in the extradition complaint], that he may be brought before such [judicial officer], to the end that the evidence of criminality may be heard and considered [in the extradition proceeding]"); *see generally Mironescu*, 480 F.3d at 665-66. And the judicial officer's certificate following the hearing is the final judgment in the United States proceedings. In general, it is subject only to collateral attack through a habeas corpus proceeding. *See Mironescu*, 480 F.3d at 669; *In re Extradition of Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993).

Thus, in this case, Snider was arrested only to compel her to appear at the hearing to determine the

sufficiency of evidence for extradition. Upon completion of that judicial proceeding—which was subject to the protections of the Fourth and Fifth Amendments—the Executive Department, through the Secretary of State, made the discretionary decision to extradite Snider to South Korea. South Korea then followed its own process in trying her, and that process need not have provided her with the protections of the U.S. Constitution. As the Supreme Court stated:

> The currently received understanding of the Bill of Rights as instituted *"to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches" of the National Government defined in the original constitutional articles* was expressed early on in Chief Justice Marshall's opinion for the Court in the leading case of *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 247 (1833): the Constitution's "limitations on power . . . are naturally, and, we think, necessarily applicable to the government created by the instrument," and not to "distinct [state] governments, framed by different persons and for different purposes."

United States v. Balsys, 524 U.S. 666, 674-75 (1998) (emphasis added) (citation omitted). In *Balsys*, the defendant declined to answer a question about his activities during World War II for fear of prosecution by Lithuania or Israel. The Supreme Court held "that concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause." *Id.* at 669. In reaching its holding, the Supreme Court stated that even though the defendant's fear of prosecution by a foreign nation might be reasonable, the criminal prosecution *by a foreign government* was nonetheless

not subject to U.S. constitutional guarantees. *Id.* at 672-74.

Likewise, Snider may not rely on her acquittal by the South Korean courts to satisfy her burden of demonstrating termination of the proceedings in her favor in connection with a seizure in the United States. The seizure in the United States was for purposes of conducting the extradition hearing, not the murder trial, and the extradition hearing did *not* terminate in Snider's favor. The U.S. magistrate judge rejected Snider's contentions that her various confessions were coerced. That ruling was a final judgment, and Snider did not challenge it collaterally through a habeas corpus proceeding. It is the extradition proceeding to which we must look for determining whether Snider was successful for purposes of a malicious prosecution claim under the Fourth Amendment because her seizure was effected only for the purpose of conducting the extradition hearing. Moreover, even if the successful outcome in South Korea could be causally relevant—a proposition that is not clear inasmuch as the South Korean trial depended on the Secretary of State's discretionary decision to make Snider available for that trial—the Supreme Court has made clear that U.S. constitutional protections do not extend to foreign prosecutions. *See Balsys*, 524 U.S. at 700 ("mere support of one nation for the prosecutorial efforts of another does not transform the prosecution of the one into the prosecution of the other").

Because there was no favorable outcome in the U.S. proceedings, as necessary to support Snider's malicious prosecution claim under the U.S. Constitution, Snider fails on the threshold inquiry of whether she alleged the violation of a constitutional right.

While we recognize that Snider did allege constitutional violations in connection with her interrogation and arrest, these claims are not before us. Our holding is limited to Snider's claim that Agent Lee violated her well-established U.S. constitutional right *to be free from malicious prosecution in the United States.* Because she has not alleged a violation of such a right, Agent Lee is entitled to qualified immunity.

Accordingly, we reverse and remand for dismissal of Snider's claim against Agent Lee for malicious prosecution.

REVERSED AND REMANDED

STAMP, Senior District Judge, concurring in the judgment:

I concur in the result reached by the majority opinion holding that Agent Lee is entitled to qualified immunity and reversing and remanding for dismissal of Snider's claims of malicious prosecution against Agent Lee. Because I would come to this result through a somewhat different approach, I respectfully write separately.

To prevail on a Fourth Amendment malicious prosecution claim under § 1983, a plaintiff must show that: (1) the defendant initiated or maintained a criminal proceeding; (2) the criminal proceeding terminated in the plaintiff's favor; (3) the proceeding was not supported by probable cause; and (4) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding. *See Lambert v. Williams*, 223 F.3d 257, 260-262 (4th Cir. 2000) (observing that a "malicious prosecution" claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates the common law

malicious prosecution tort elements except for malice). The element requiring favorable termination of the criminal proceedings constitutes both a predicate for recovery under § 1983 and the accrual date of the claim for determining the running of the statute of limitations. *See Brooks v. City of Winston-Salem*, 85 F.3d 178, 183-84 (4th Cir. 1996). This element is satisfied where a prior criminal case against the plaintiff has been disposed of in a way that indicates the plaintiff's innocence. *See Murphy v. Lynn*, 118 F.3d 938, 948 (2d Cir. 1997) ("Where the prosecution did not result in an acquittal, it is deemed to have ended in favor of the accused . . . only when its final disposition is such as to indicate the innocence of the accused."). A termination may be favorable to an accused where such termination is the result of:

> (a) a discharge by a magistrate judge at a preliminary hearing, or
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> (b) the refusal of a grand jury to indict, or
>
> (c) the formal abandonment of the proceedings by the public prosecutor, or
>
> (d) the quashing of an indictment or information, or
>
> (e) an acquittal, or
>
> (f) a final order in favor of the accused by a trial or appellate court.

Restatement 2d of Torts § 659 (1976); *accord Kossler v. Crisanti*, 564 F.3d 181, 187 (3d Cir. 2009). Requiring a plaintiff to show a favorable termination works to ensure against inconsistent judgments and to avoid parallel litigation on issues of probable cause. *See Murphy*, 118 F.3d at 948.

In this action, the majority opinion holds that Snider's claims against Agent Lee must be dismissed because Snider's acquittal by the South Korean court does not establish the favorable termination element of a Fourth Amendment malicious prosecution cause of action. The majority reaches this result by finding that an accused's constitutional protections do not extend to foreign prosecutions. According to the majority, Snider may not rely upon her acquittal as establishing the favorable termination element of her malicious prosecution claim because the favorable termination of Snider's prosecution occurred in a foreign jurisdiction, In the majority's view, the only United States proceeding relevant to Snider's malicious prosecution claim is the extradition hearing, which terminated adversely to Snider. Accordingly, the majority concludes that Snider has failed to allege a constitutional violation and that Agent Lee is therefore entitled to qualified immunity.

According to the majority's opinion, only two elements comprise a Fourth Amendment malicious prosecution claim: (1) a wrongful seizure, and (2) termination in the defendant's favor of the proceedings following the seizure. As stated above, it seems well established in this Circuit, and others, that a malicious prosecution claim requires at least four elements: (1) the initiation or maintenance of a criminal proceeding; (2) favorable termination of that proceeding; (3) lack of probable cause to support that proceeding; and (4) a wrongful seizure flowing from that proceeding.[1] While the majority's formulation may

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[1] Some courts require a showing of malice as a fifth element. The Fourth Circuit has rejected malice as an element to a Fourth Amendment "malicious prosecution" claim. *See Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 n.5 (4th Cir. 1996).

possibly be read as implicitly incorporating these four elements, it would probably be useful to explicitly set forth the four elements.

Further, the majority opinion states that Snider was seized by United States law enforcement officials pursuant to an arrest warrant issued on the basis of the Korean government's extradition request. In the majority's view, the sole purpose of the arrest was to hold an extradition hearing. This seems to me an overly narrow characterization of the reasons underlying Snider's seizure. Certainly, Snider was arrested and ordered to appear before a magistrate judge for an extradition hearing, but the extradition hearing was merely a means of prosecuting the broader criminal action against Snider.[2] Thus, I believe the purpose of Snider's seizure was to determine whether the criminal prosecution should proceed by ascertaining whether Snider was extraditable. In other words, the purpose of the arrest was to advance the prosecution toward its termination (be it favorable or unfavorable). At the conclusion of the extradition hearing, the proceedings against Snider did not end. She was detained, extradited to Korea, tried, and ultimately acquitted. Therefore, it seems to me that the extradition hearing was simply one aspect of the broader purpose of Snider's arrest—that is, the prosecution of the murder charge against her.

Where a criminal prosecution terminates in favor of a defendant who, as a result of the criminal

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[2] Extradition is sui generis, neither civil nor criminal in nature. *See, e.g., Jhirad v. Ferrandina*, 536 F.2d 478, 482 (2d Cir. 1976), *cert. denied*, 429 U.S. 833 (1976); *Martin v. Warden*, 993 F.2d 824, 828 (11th Cir. 1993); *In re Nava Gonzalez*, 305 F. Supp. 2d 682, 689 (S.D. Tex. 2004); *In re Extradition of Massieu*, 897 F. Supp. 176, 177 (D.N.J. 1995).

proceedings, has suffered a deprivation of liberty without probable cause, a Fourth Amendment "malicious prosecution" cause of action will lie. As noted above, a favorable termination can occur in one of many ways. For example, had the magistrate judge concluded that Snider was not extraditable for lack of probable cause, the proceedings would have terminated in her favor. However, acquittal is also a favorable termination. Snider was acquitted. That her acquittal was effected under the authority of the Korean government is not as significant as the fact that the criminal proceedings terminated in her favor.

Also, the majority's opinion does not seem to me to acknowledge the circumscribed purpose of an extradition hearing and the limited ability of a defendant to challenge the evidence presented against him or her in such a proceeding. The following excerpt from a concurring opinion in *Ordinola v. Hackman*, 478 F.3d 588, 608-609 (4th Cir. 2007), is instructive:

> The extradition hearing, of course, "'is not . . . in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him.'" *LoDuca* [*v. United States*, 93 F.3d 1110, 1104 (2d Cir. 1996)] (quoting *Benson v. McMahon*, 127 U.S. 457, 463 (1888)). Stated differently, the hearing is "not designed as a full trial" but as a means of "inquir[ing] into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country." *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir.1976); *see Eain* [*v. Wilkes*, 641 F.2d 504, 508 (7th Cir. 1981)] ("It is fundamental that the person whose extradition is sought is not entitled to a full trial at the magistrate's probable cause hearing . . . .

That is the task of the . . . courts of the other country.").

Although the extradition statute does not mention "probable cause" and instead directs the extradition court to determine whether there is "evidence sufficient to sustain the charge under the provisions of the proper treaty or convention," 18 U.S.C.A. § 3184, courts have uniformly interpreted the statutory language to require a finding of "probable cause." *See Vo* [*v. Benov*, 447 F.3d 1235, 1237 (9th Cir. 2006)]; *Sidali* [*v. INS*, 107 F.3d 191, 195 (3d Cir. 1997)]. Thus, "[t]he probable cause standard applicable to an extradition hearing is the same as the standard used in federal preliminary hearings," meaning that *the magistrate judge's role is merely "to determine whether there is competent evidence to justify holding the accused to await trial." Hoxha* [*v. Levi*, 465 F.3d 554, 561 (3d Cir. 2006)] (internal quotation marks omitted). In that vein, the evidence considered by the magistrate as part of an extradition hearing "need not meet the standards for admissibility at trial" and "may be based upon hearsay in whole or in part." [*United States v.*] *Kin-Hong*, 110 F.3d [103,] 120 [(1st Cir. 1997)] (internal quotation marks omitted).

Not only are the admissibility standards relaxed, but the alleged fugitive's ability to challenge the government's evidence or to submit evidence of his own at the extradition hearing is also significantly limited. For example, the fugitive has no right to cross-examine witnesses, *see Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1406-07 (9th Cir. 1988), or to introduce "contradictory evidence" that conflicts with the government's probable

> cause evidence, *see Hoxha*, 465 F.3d at 561. By contrast, "explanatory evidence" relating to the underlying charges is admissible. *See Koskotas v. Roche*, 931 F.2d 169, 175 (1st Cir. 1991).
>
> If the extradition judge concludes that there is, in fact, probable cause, he "is required to certify the individual as extraditable to the Secretary of State." *Vo*, 447 F.3d at 1237 (internal quotation marks omitted).

Ordinola v. Hackman, 478 F.3d 588, 608-609 (4th Cir. 2007) (Traxler, J., concurring) (emphasis added; footnote omitted). As the concurring opinion in *Ordinola* observes, the purpose of an extradition hearing is merely to make a probable cause determination, not to conduct a trial on the merits of the criminal charges. Accordingly, the procedural safeguards attending a criminal trial are absent from an extradition hearing. Consequently, evidence which might be excluded at trial, including hearsay evidence, is admissible at the extradition hearing; the accused is prohibited from challenging the government's evidence and from submitting evidence on his or her own behalf; and the accused has no right to cross-examine witnesses. These conditions set a high bar for obtaining a favorable termination at the extradition stage of proceedings. In a case such as this one, where the evidence supporting probable cause was obtained in the United States by United States federal officials, it seems unreasonable to limit the favorable termination element of a malicious prosecution claim to a favorable result in the extradition hearing, particularly in light of the narrow purpose of such a hearing and the limited ability of the accused to challenge the evidence presented against him or her at that proceeding.

I would also note that, for purposes of a malicious prosecution claim, the prosecution was arguably initiated in the United States.[3] Although formal charges were brought in Korea, the interrogation yielding the allegedly false confession to establish probable cause may properly be considered to have initiated prosecution because it resulted in the issuance of an arrest warrant and, consequently, Snider's arrest in this country. *See Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996) (finding that a wrongful arrest could conceivably constitute the first step towards a malicious prosecution claim). Because the criminal proceedings could be deemed to have been initiated in the United States, I believe that it should be recognized that Snider's acquittal was a favorable termination of the criminal proceedings against her, even though the termination occurred in Korea.

Finally, the majority opinion contends that the protections afforded to criminal defendants by the United States Constitution do not apply to prosecutions in foreign jurisdictions. As support, the majority opinion cites *United States v. Balsys*, 524 U.S. 666, 672-74 (1998). There, Aloyzas Balsys ("Balsys"), a resident alien in deportation proceedings, refused to answer questions about his activities in certain foreign countries during World War II because his answers could potentially subject him to criminal prosecutions by those foreign governments. As grounds for his refusal to answer, Balsys invoked the Fifth

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[3] As noted above, one of the elements of a Fourth Amendment "malicious prosecution" claim is the initiation or maintenance of a criminal proceeding by the defendant in the malicious prosecution action. *See Lambert v. Williams*, 223 F.3d 257, 260-262 (4th Cir. 2000).

Amendment privilege against self-incrimination. On appeal, the United States Supreme Court framed the issue as "whether a criminal prosecution by a foreign government not subject to our constitutional guarantees presents a 'criminal case' *for purposes of the privilege against self-incrimination*." *Id.* at 672 (emphasis added). The answer, in short, was that it did not. The Court held that a person who fears criminal prosecution only by a foreign government may not invoke the Fifth Amendment privilege against self-incrimination because the sovereign seeking to compel the self-incriminating statements is not the same sovereign that may use the self-incriminating statements in a subsequent criminal prosecution. *Id.* at 673-74.

The circumstances in *Balsys*, I believe, are inapposite to Snider's case, but the majority's statement of the proposition of law for which *Balsys* stands also extends more broadly than that case holds. First, the constitutional privilege that *Balsys* sought to invoke—the Fifth Amendment right against self-incrimination—was not designed to provide protection in the civil proceedings in which Balsys was then involved, but rather as protection in a possible subsequent criminal action. Here, the constitutional guarantee at issue—the Fourth Amendment right to be free from unreasonable seizure—was designed to provide protection in the very proceedings in which that right was allegedly violated. Moreover, although the Korean government is the sovereign that brought the criminal charges against Snider, it is a United States federal agent who initiated the prosecution in the United States by obtaining the allegedly coerced confession which served as the basis of probable cause for the Korean government's criminal action against Snider to proceed. It is difficult for me to

conclude that *Balsys* means that the Fourth Amendment protection to be free from unreasonable seizure without probable cause does not extend to a United States citizen whose seizure resulted from a coerced confession obtained by a United States federal agent on United States soil merely because a foreign sovereign, not the United States, pursued the criminal action.

Although the analysis and rationale set forth in the majority opinion differ from mine, I firmly believe that the majority reaches the correct result. A law enforcement officer who presents all relevant probable cause evidence to a prosecutor, a magistrate, or other intermediary is insulated from a malicious prosecution claim where such intermediary makes an independent decision to pursue prosecution or issue a warrant, thereby breaking the causal chain between the officer's conduct and the prosecution unless the officer concealed or misrepresented facts or brought such undue pressure to bear on the intermediary that the intermediary's independent judgment was overborne. *See Rhodes v. Smithers*, 939 F. Supp. 1256, 1274 (S.D. W. Va. 1995) (collecting cases), *aff'd*, 91 F.3d 132 (4th Cir. 1996); *see also Taylor v. Meacham*, 82 F.3d 1556, 1564 (10th Cir. 1996); *Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996). Here, the Assistant United States Attorney pursued prosecution on behalf of the Korean Government by seeking a provisional arrest warrant and subsequent extradition. An arrest warrant was issued and a detention hearing was held. The magistrate judge ordered Snider detained pending her extradition hearing. Moreover, an extensive extradition hearing was held. After that hearing and in consideration of the evidence presented, the magistrate judge found that the evidence established probable cause to extradite Snider. Nothing on

the record suggests that Snider alleges that Agent Lee made false or misleading statements to the prosecutors or the magistrate judge or that Agent Lee otherwise brought undue influence to bear on their independent judgment. Under these circumstances, even if Agent Lee coerced Snider into falsely confessing, the causal chain was broken, and, accordingly, there was no constitutionally infirm seizure. Therefore, Snider's malicious prosecution claim should not have been permitted to go forward, since Agent Lee is entitled to qualified immunity.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA HUNTINGTON DIVISION

CIVIL ACTION NO. 3:07-0335

KENZI NORIS ELIZABETH SNIDER,
Plaintiff,

v.

Federal Bureau of Investigation Agents MARC DIVITTIS, and SEUNG LEE; and United States Army Criminal Investigation Division Agent MARK MANSFIELD,
Defendants.

MEMORANDUM OPINION AND ORDER

Pending before this Court is Defendant Seung Lee's Motion to Dismiss or in the Alternative, Motion for Summary Judgment (Doc. No. 19). Based upon the motion, the additional filings, and oral argument and for the reasons below, the Court GRANTS in part and DENIES in part the motion.

FACTS

In 2001, Jamie Penich, an American college student, was murdered while studying abroad in South Korea. Plaintiff, Kenzi Noris Elizabeth Snider, knew Penich while they were living in South Korea. When she returned to the United States, Plaintiff was questioned and eventually confessed to murdering Penich. Plaintiff was extradited to South Korea where she was tried and acquitted—in the trial court on June

19, 2003, by the three-judge appeals court on October 14, 2003, and by the Korean Supreme Court on January 13, 2006.

On May 24, 2007, Plaintiff brought suit against Federal Bureau of Investigation Agent Marc Devittis ("Devittis"), United States Criminal Investigation Agent Mark F. Mansfield ("Mansfield"), Federal Bureau of Investigation Agent Seung Lee ("Lee"), and the Federal Bureau of Investigation ("FBI"). She alleged seven causes of action: 1) Fifth Amendment: coerced confession; 2) Fifth Amendment: deprivation of right to fair trial, wrongful extradition, and wrongful imprisonment; 3) Fifth Amendment: failure to intervene; 4) Fourth Amendment: false imprisonment; 5) Sixth Amendment: denial of right to counsel; 6) State Law Claim: fraudulent prosecution; 7) State Law Claim: outrage/intentional infliction of emotional distress.

The United States filed a Motion to Dismiss and Substitute, which this Court granted on February 6, 2008. As a result, the FBI was dismissed from the suit and the sixth and seventh causes of action were dismissed; the first five causes of action against the individual officers remain.[1]

On October 4, 2007, Agent Lee filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. Thereafter, the Court invited both parties to submit additional briefs and present oral argument on the applicability of the United States Supreme Court decision of *Wallace v. Kato*, 127 S.Ct. 1091 (2007).

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[1] As Agents Divittis and Mansfeld have not yet been served in this action, the Court will address the suit only in reference to Agent Lee.

DISCUSSION

In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the United States Supreme Court disavowed the "no set of facts" language found in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957), previously used to evaluate complaints subject to 12(b)(6) motions. *Twombly*, 127 S. Ct. at 1969. In its place, courts must now look for "plausibility" in the complaint. This standard requires a plaintiff to set forth the "grounds" for an "entitle[ment] to relief" that is more than mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (internal quotation marks and citations omitted). Accepting the factual allegations in the complaint as true, the allegations "must be enough to raise a right to relief above the speculative level . . . ." *Id.* at 1965 (citations omitted). If the allegations in the complaint, assuming their truth, do "not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 1966 (internal quotation marks and citations omitted). Two weeks after issuing its decision in *Twombly*, the Court emphasized in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" 127 S. Ct. at 2200 (quoting *Twombly*, 127 S. Ct. at 1964 (other citations and some internal quotations omitted). Thus, "a universal standard of heightened fact pleading" is not required, rather it is "a flexible 'plausibility standard,' which obliges a pleader to

amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Iqbal v. Hasty*, 490 F.3d 143,157-58 (2d Cir. 2007) (italics original). It is under this revised standard that the Court will evaluate each of Defendant Lee's arguments.

Plaintiff's Untimely Response

The Court notes that Plaintiff did not respond in a timely fashion and did not seek leave of Court to file beyond the deadline. However, in the interest of justice the Court will consider Plaintiff's response in analyzing the motion.

Collateral Estoppel

Defendant Lee argues that Plaintiff is collaterally estopped from re-litigating the coerced confession issue because it was addressed and adjudged in the extradition proceeding. By that argument, since Counts I-V are based upon the coerced confession, the claims should be dismissed because the parties are in privity, the claims are substantially the same, and there was a final judgment on the merits.

"For collateral estoppel to apply, the proponent must establish that (1) the issue sought to be precluded is identical to the one previously litigated; (2) the issue must have been actually determined in the prior proceeding; (3) determination of the issue was a critical and necessary part of the decision in the prior proceeding; (4) the prior judgment must be final and valid; and (5) the party against whom preclusion is asserted must have had a full and fair opportunity to litigate the issue in the previous forum." *Eddy v. Waffle House, Inc.*, 482 F.3d 674, 679 (4th Cir. 2007) citing *Sedlack v. Braswell Services Group, Inc.*, 134

F.3d 219, 224 (4th Cir. 1998). The United States Supreme Court explained the purpose of the doctrine: "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co., Inc., v. Shore*, 439 U.S. 322, 326 (1979).

In the Memorandum and Order based upon the extradition hearing, the Magistrate Court made clear that "the responsibility of the court in the extradition process. . . differs significantly from the adjudicative process normally encountered." Mem. & Order, p. 3. The Court explained, "far from the usual 'final judgment' resolving matters in difference between the parties, in extradition proceedings the court, if it finds that treaty and statutory requirements are met, certifies this finding, together with the record in the case, to the Secretary of State." *Id.* (citations omitted). After receiving this certification, the "decision on whether to surrender the fugitive, 'rests in the discretion of the Secretary of State.'" *Id.* (citations omitted).

The Magistrate Court found that Plaintiff's confessions were not coerced for the purpose of establishing probable cause sufficient to permit extradition to Korea. However, the Court's opinion is clear—the findings in an extradition proceedings are not a "final judgment." The Court's role in an extradition hearing is that of "executive" and not a "judicial function." Mem. & Order, p. 2-3. Therefore, the Court's finding could not be considered a "final judgment on the merits" for the purposes of collateral estoppel.

Additionally, the extradition hearing did not subscribe to the Federal Rules of Evidence or the

Federal Rules of Criminal Procedure, so the proceedings did not give the plaintiff a "full and fair opportunity" to litigate the issue. Mem. & Order, p. 5. In fact, "evidence of alibi, evidence relating to credibility, evidence contradicting a requesting party's proof and evidence in defense, such as insanity, have been excluded in extradition proceedings." *Id.* at p. 3 (citations omitted). As stated in the Southern District of New York case cited by Defendant Lee, "an accused has no confirmed right at an extradition proceeding to present evidence that contradicts the requesting party's case. 'Evidence of. . . facts contradicting the demanding country's proof or of a defense. . . may properly be excluded from the Magistrate's hearing.'" *Gill v. Imundi*, 747 F.Supp. 1028, 1040 (S.D.N.Y. 1990) *quoting Shapiro v. Ferrandina*, 478 F.2d 894, 901 (2d Cir. 1973) *cert. dismissed*, 414 U.S. 884 (1973). In other words, the defendant in the extradition hearing, or Plaintiff here, is not given a "full and fair opportunity" to litigate.

Finally, dismissing this case would not serve the purposes of collateral estoppel and prevent "needless litigation." Clearly the rules and procedures followed, the role of the court, as well as the purposes of the extradition proceeding, were sufficiently different such that the parties should be entitled to litigate the issues fully. While this Court recognizes the importance for judicial economy, notions of fairness require that the plaintiff not be collaterally estopped from litigating her claims.

Viable Bivens Action & Failure to State a Claim

Defendant Lee next argues that Plaintiff has not established a viable *Bivens* action against him. Defendant contends that the claims were litigated in the extradition hearing or that Plaintiff did not

establish facts sufficient to constitute a claim. As established above, this Court is unwilling to determine that the prior extradition hearing provided a fair forum such that Plaintiff's claims should be dismissed at this stage. The requirements of the Supreme Court in *Twombly* require only that the Plaintiff establish a "plausible" claim to avoid a motion to dismiss. The Court must ensure that there are facts sufficient to put the opposing part on notice of the claim and the grounds upon which the claim rests. *Twombly*, 127 S. Ct. at 1964. The complaint must comprise "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974. The Court will look at each claim.

In Count I, a claim under the Fifth Amendment alleging her confession was coerced, Plaintiff states that the "Defendant Agents, pursuant to the training and policy of the Federal Bureau of Investigation. . . fabricated a story" of Plaintiff's guilt and "coerced her into distrusting her actual memory and adopting their fabrication as truth." Complaint, p. 15. Plaintiff details that there were "psychological methods" used to coerce her and that the confession ultimately was used against her. Although Defendant Lee is correct that the Court must consider all the surrounding circumstances when considering whether a confession is coerced, those detailed considerations are not necessary when considering a motion to dismiss. *United States v. Braxton*, 112 F.3d 777, 781, 785 (4th Cir. 1997) (stating that courts should consider the "totality of the circumstances" when determining if a confession was coerced).

Count II alleges deprivation of a right to fair trial, wrongful extradition, and wrongful imprisonment. Plaintiff's describes in the Complaint that Defendant

Lee assisted the agents in the wrongful confession which led to the extradition, charges, prosecution, and imprisonment.

The third count of the Complaint alleges a failure to intervene based upon the Fifth Amendment. Plaintiff explains that the officers did not prevent the misconduct, coercion, and emotional distress during the interrogation. These alleged facts occurred during Defendant Lee's participation and involvement in the interrogation and are sufficient to form a plausible claim against Defendant Lee.

Count IV alleges that Defendant Lee assisted the officers in the actions that led to the false imprisonment. There are, therefore, facts sufficient to establish a plausible claim against Defendant Lee for false imprisonment.

In Count V, Plaintiff alleges denial of the right to counsel. Based on the facts alleged, Plaintiff establishes a plausible claim that she was in custody and should have been offered the right to counsel during Defendant Lee's interrogation of her.

The Complaint provides sufficient detail for each of these five Counts against Defendant Lee to be plausible and put Defendant Lee on notice so he can establish a defense. The Court will not dismiss the Counts for failure to state a claim.[2]

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[2] The Court notes that, despite Defendant Lee's contention that Plaintiff cannot seek relief on these claims because they occurred in Korea, the facts that are the basis for the claims took place in the United States. Additionally, as the Court understands her claims, Plaintiff is not challenging the legal processes of the Korean court system; she challenges Defendant Lee's failure to adhere to the constitutional protections she should have been afforded in the United States.

Qualified Immunity

In order to determine whether an officer has qualified immunity, "courts are required to resolve a 'threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry.'" *Scott v. Harris*, 127 S.Ct. 1769, 1774 (2007) *quoting Saucier v. Katz*, 533 U.S. 194, 201 (2002). Only if the court "finds a violation of a constitutional right" does the Court proceed to the next step, "whether the right was clearly established. . . in light of the specific context of the case." *Id. quoting Saucier*, 522 U.S. at 201. The purpose of qualified immunity is "to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Saucier*, 522 U.S. at 195.

"The first step in assessing the constitutionality" of the officer's actions "is to determine the relevant facts." *Scott*, 127 S.Ct. at 1774. When there have not yet been factual findings, "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [. . .] motion.'" *Id. quoting United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam); Saucier, 533 U.S. at 201. "In qualified immunity cases, this usually means adopting . . . the plaintiff's version of the facts." *Scott*, 127 S.Ct. at 1775.

Defendant Lee contends that there was no constitutional violation because the Magistrate in the extradition hearing adjudged that the confession was not coerced. However, as this Court determined above, that decision was not a "final judgment." Taking Plaintiff's version of the facts as true for this inquiry, there were psychological influences from the

officers that resulted in her coerced confession; Plaintiff was entitled, but not permitted, to consult with an attorney; and the officers failed to intervene to protect her. These facts, if true, establish that Defendant Lee violated at least one constitutional right.

Because there was a violation of a constitutional right, the Court must proceed to the second inquiry to determine whether qualified immunity is appropriate—namely, whether the right was clearly established. "The relevant, dispositive inquiry is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 194-95. The situation that Defendant Lee confronted was one in which he was questioning Plaintiff in a hotel room about her potential involvement in a murder that occurred in Korea. Although the specific facts as to the circumstances are in dispute—for example, whether the questioning was custodial or not and whether she was entitled to the presence of counsel or not—the rights involved were clearly established. It is clearly established that officers are not entitled to coerce a confession, that individuals in custodial interrogations are entitled to counsel, and that officers have a duty to intervene to protect certain individuals in circumstances where they may be harmed by another officer. *See e.g. Dickerson v. United States*, 530 U.S. 428, 434 (2000) (stating that involuntary confessions must be excluded from court proceedings and re-stating that the purpose of *Miranda* warnings is to protect against coerced confessions); *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (holding that in a custodial interrogation, the person must be told of his right to, *inter alia*, counsel); *Winfield v. Bass*, 106 F. 3d 525, 531 (4th Cir. 1997) (stating that it was clearly

established that prison officials had a duty to protect prisoners).

Because there was at least one constitutional violation and the rights were clearly established, Defendant Lee should have known and adhered to those rights. Therefore, he is not entitled to qualified immunity.

Constitutional Claims As Time Barred

The parties agree that the applicable statute of limitations for Plaintiff's *Bivens* claims is two years based on West Virginia's personal injury statute of limitations. *Bell ex re. Bell v. Board of Educ. Of County of Fayette*, 290 F. Supp.2d 701, 709 (S.D.W.Va. 2003); Pl. Response to Def. Seung Lee's Mot. To Dismiss, or in the Alternative, Mot. For Summ. J., p. 3. Because the statute of limitations is two years, the issue is when the cause of action accrued.

Defendant Lee argues that the causes of action accrued either on October 11, 2002, the date of the Magistrate Court's Memorandum and Order, or on December 17, 2002, when Plaintiff's time period for filing *habeas corpus* relief expired and the United States Secretary of State ordered her released to the Korean authorities. Plaintiff responds that the claim accrued on January 13, 2006, the date on which Plaintiff was acquitted by the Korean Supreme Court.

Plaintiff relies heavily on the United States Supreme Court's holding in *Heck v. Humphrey*. 512 U.S. 477 (1994). There, the Court cautioned against proceeding in a civil case that, if successful, might undermine the validity of a criminal judgment against the plaintiff. *Heck v. Humphrey*, 512 U.S. at 487. "But if the district court determines that the plaintiff's

action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.*

The United States Supreme Court recently clarified its holding in *Heck*. *See Wallace v. Kato*, 127 S.Ct. 1091 (2007). In *Wallace v. Kato* the petitioner brought a § 1983 claim for false arrest after his conviction was set aside. *Id.* The Court held that he brought the claim too late—since his claim was for a false arrest, the statute of limitations for the § 1983 claim began on the date "legal process was initiated against him," not the date that his conviction was set aside. *Id.* at 1096, 1097-98. The Court then explained how this related to *Heck*. "The *Heck* rule for deferred accrual is called into play only when there exists. . . an 'outstanding criminal judgment.' It delays what would otherwise be the accrual date of a tort action until the setting aside *of an extant conviction* which success in that tort action would impugn." *Id.* at 1097-98 (citations omitted). The Court stated that the *Heck* principle would be applied "to the date on which the statute of limitations began to run, that is, the date petitioner became held pursuant to legal process." *Id.* at 1098. When Wallace was held pursuant to legal process, there was still no criminal conviction that the tort cause of action would impugn. *Id.* The Court admonished that if "a plaintiff files a false arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended." *Id.* at 1098. Therefore, "[i]f the plaintiff is

ultimately convicted, and if the stayed civil suit would impugn that conviction, Heck will require dismissal; otherwise the civil action will proceed, absent some other bar to suit." *Id.*

In terms of when the suit is appropriate, the Court stated: "Under the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable." *Wallace*, 127 S.Ct. at 1097 (citations omitted). The Fourth Circuit similarly stated that for a civil rights action, "the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action." *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1162 (4th Cir. 1991) *quoting Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975).

Therefore, based on *Wallace*, the plaintiff must file suit as soon as the act results in damages, even if the cause of action could impugn the pending criminal proceedings; it is up to the district courts to stay those actions. Both parties argued how *Wallace* applies or does not apply to each of the remaining causes of action based upon the two year statute of limitations. The Court will address the *Wallace* arguments as to each claim.[3]

Coerced Confession

The coerced confession claim requires that the Court look to the "totality of the circumstances" in

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[3] Plaintiff argues that *Wallace* is not retroactive and does not apply to Plaintiff's case. The Supreme Court did not create new law; rather it explicitly stated what the law is. There is no issue of retroactivity. *Wallace* certainly applies to Plaintiff's case.

determining whether the individual was unduly influenced and whether the confession was voluntary. Plaintiff argues that if Plaintiff brought and won the claim for coerced confession, it would have necessarily impugned the validity of the extradition order and criminal prosecution against her. This distinguishes her position from that of the petitioner in *Wallace*—had a Court found that he was falsely arrested, it would not have impugned the prosecution that followed.

As discussed above, even if the claim for coerced confession would have impugned the pending criminal proceeding, it was the district court's responsibility to stay the proceedings until the subsequent conviction or acquittal. The issue is only when the coerced confession resulted in damages such that Plaintiff's cause of action accrued.

Arguably, there are several different points in time when Plaintiff was harmed by the coerced confession such that the cause of action would have accrued. Plaintiff's coerced confession led to the warrant, the extradition, and the prosecution. The interrogation during which the coerced confession occurred took place on February 4, 5, and 6, 2002. Plaintiff was arrested on February 28, 2002. Magistrate Judge Taylor approved her extradition on October 9, 2002. Plaintiff was acquitted in trial court on June 19, 2003 and in appeals court on October 14, 2002. She was finally acquitted by the Korean Supreme Court on January 13, 2006. In order for her to meet the statute of limitations, the date that Plaintiff filed suit, May 24, 2007, must have been within two years of the "wrongful act or omission [that] result[ed] in damages." *Wallace*, 127 S.Ct. at 1097 (citations omitted). As stated above, "the cause of action accrues even

though the full extent of the injury is not then known or predictable." *Id.* The first point at which the coerced confession resulted in damages could have been the warrant, the extradition, or the prosecution. Using any of those dates, however, Plaintiff filed her claim beyond the statute of limitations. She should have filed suit at the first moment she was harmed by the wrongful act, even if the extent of the harm was not determinable at the time. The district court would have stayed the proceedings and the claims would have proceeded after her acquittal. For these reasons, the claim for coerced confession is DISMISSED.

Deprivation of Right to Fair Trial, Wrongful Extradition, Wrongful Imprisonment

As Plaintiff mentioned in her Supplemental Brief and during oral arguments, this Count most resembles a claim for malicious prosecution and the Court will therefore treat the cause of action as such.[4] The Supreme Court noted in *Wallace* that a claim for malicious prosecution cannot accrue until "favorable termination of a criminal proceeding" because that is an element of the claim. *Wallace*, 127 S.Ct. at 1097. Here, Defendant Lee argues that the date of the first acquittal should apply because that was when the proceeding ended favorably to Plaintiff. However, because the system in Korea allows for the prosecution to appeal an acquittal, the proceeding did not truly end in her favor until January 13, 2006 when

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[4] A cause of action for malicious prosecution "must include (1) the initiation or maintenance of a proceeding against the plaintiff by the defendant; (2) termination of that proceeding favorable to the plaintiff; (3) lack of probable cause to support that proceeding; and (4) the defendant's malice." *Lambert v. Williams*, 223 F.3d 257, 260 (4th Cir. 2000).

the Korean Supreme Court acquitted her. Based on this date and the two year statute of limitations, Count II, which is effectively a claim for malicious prosecution, is not untimely. She was required to have a favorable termination prior to filing the suit. The motion to dismiss the cause of action is DENIED.

Failure to Intervene

Plaintiff argues that in order to prevail on a claim for failure to intervene, she would need to show that the defendants knew of the lack of incriminating evidence against her and of the coercive nature of the interrogations. She notes that if a court were to recognize those facts, it would necessarily impugn the proceedings against her. However, as this Court made clear above, that the cause of action would impugn the criminal proceedings is not determinative. Once filed, the district court can stay the proceeding if it would necessarily impugn the pending criminal suit.

The issue is when Plaintiff was harmed such that the cause of action accrued. As with the claim for coerced confession, there are several dates based on which Plaintiff could argue she was harmed because of the officers' failure to intervene. She could argue that the wrongful act of failing to intervene harmed her when she was coerced into confessing, when she was arrested, when she was extradited, or when she was prosecuted in Korea. Again, as was true with the coerced confession claim, the initial harm took place long before the final date of acquittal and well before the two years prior to filing this claim. That she could not and did not know the full extent of damages does not delay accrual. The motion to dismiss the cause of action for failure to intervene is therefore GRANTED and the cause of action is DISMISSED.

False Imprisonment

Plaintiff acknowledges that if she brought a successful claim for false imprisonment, it would not necessarily impugn the criminal proceedings against her. For this reason, she urges that court to utilize an equitable tolling. The Supreme Court chided the suggestion of equitable tolling in *Wallace*: "We know of no support (nor does the dissent suggest any) for the far-reaching proposition that equitable tolling is appropriate to avoid the risk of concurrent litigation. . . . Equitable tolling is a rare remedy to be applied in unusual circumstances. . . ." *Wallace*, 127 S.Ct. at 1099-1100. Plaintiff is not entitled to equitable tolling here because her claim for false imprisonment, like a claim for false arrest, ended when she was subjected to legal process. On February 28, 2002, she was arrested pursuant to a lawful warrant. At that time, she had two years to file a claim for false imprisonment. As those two years have passed, the cause of action for false imprisonment is DISMISSED.

Denial of the Right to Counsel

Plaintiff argues that to succeed on a claim of denial of the right to counsel, she would have to show that Defendants deprived her of her right to counsel during an interrogation. She argues that this would have rendered the statement invalid and therefore the criminal proceedings based upon the statement invalid.

Like the claim for false arrest, Plaintiff would have been able to bring the claim as soon as she was subject to legal process. In other words, once Plaintiff was arrested with a valid warrant and then permitted to obtain counsel, her claim would have accrued. At that point, she had been initially harmed because

she was coerced to confess without counsel. Therefore, as the valid arrest was on February 28, 2002, the statute of limitations has run and the cause of action for denial of right to counsel is DISMISSED.

Summary Judgment

Defendant Lee argues that in the alternative to dismissing the action, the action should be subject to summary judgment. Plaintiff's remaining claim is Count II, claims for Deprivation of Right to Fair Trial, Wrongful Extradition, and Wrongful Imprisonment—effectively a claim for malicious prosecution. As the Court stated above in footnote 3, a malicious prosecution claim requires "(1) the initiation or maintenance of a proceeding against the plaintiff by the defendant; (2) termination of that proceeding favorable to the plaintiff; (3) lack of probable cause to support that proceeding; and (4) the defendant's malice." *Lambert v. Williams*, 223 F.3d 257, 260 (4th Cir. 2000). Defendant cites the extradition transcript as the basis for this contention, stating that Plaintiff's testimony suffices to show she cannot meet the required standard for summary judgment.

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)). In considering a motion for summary judgment, the Court will not "weigh the evidence and determine the truth of the matter[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the Court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U. S. 574, 587-88 (1986). Although the Court will view all underlying facts and inferences

in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some "concrete evidence from which a reasonable juror could return a verdict in his [or her] favor[.]" *Anderson*, 477 U. S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U. S. 317, 322-23 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere "scintilla of evidence" in support of his or her position. *Anderson*, 477 U.S. at 252.

It is clear that Defendant Lee played a role in the initiation of the criminal proceedings against Plaintiff and that there was termination favorable to the plaintiff. Therefore, there must be a scintilla of proof that there was a lack of probable cause to support the proceeding and that the defendant acted with malice. In reviewing the transcript to which Defendant Lee cites, it is clear that Plaintiff has presented more than a scintilla of evidence of her claims. Her testimony reflects that her confession was the product of suggestion by the officers and that her statement to them was in response to the officers' contentions that her recollection was incorrect. Taking the facts in the light most favorable to the non-moving party, Plaintiff establishes a basis for her claims beyond a scintilla. That there is such evidence precludes summary judgment.

CONCLUSION

For the reasons above, the Court GRANTS in part and DENIES in part Defendant Seung Lee's Motion

to Dismiss or in the Alternative, Motion for Summary Judgment (Doc. No. 19).

Specifically, the Court GRANTS the motion with respect to Count I (Coerced Confession), Count III (Failure to Intervene), Count IV (False Imprisonment), and Count V (Denial of Right to Counsel). Counts I, III, IV, and V are DISMISSED. The Court DENIES the Motion to Dismiss with respect to Count II (Deprivation of Right to Fair Trial, Wrongful Extradition, Wrongful Imprisonment). The Court also DENIES the alternative Motion for Summary Judgment.

The Court DIRECTS the Clerk to send a copy of this written Order and Opinion to counsel of record and any unrepresented parties.

ENTER: March 10, 2008

/s/ ROBERT C. CHAMBERS
ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA HUNTINGTON DIVISION

CIVIL ACTION NO. 3:07-0335

KENZI NORIS ELIZABETH SNIDER,
Plaintiff,

v.

UNITED STATES; Federal Bureau of Investigation Agents MARC DIVITTIS, and SEUNG LEE; and United States Army Criminal Investigation Division Agent MARK MANSFIELD,
Defendants.

MEMORANDUM OPINION AND ORDER

Pending before this Court is the United States' Motion to Dismiss and Motion to Substitute (Doc. No. 11). For the reasons mentioned below, the Court GRANTS the motion.

FACTS

In 2001, Jamie Penich, an American college student was murdered while studying abroad in South Korea. Plaintiff, Kenzi Noris Elizabeth Snider, was among the people with whom Penich associated while living in South Korea. Upon returning to the United States, Plaintiff was questioned and eventually wrote a confession, stating that she had murdered Penich. Plaintiff was extradited to South Korea where she was tried and acquitted—in the trial court, by the three-judge appeals court, and by the Korean Supreme Court. The affirmation of her acquittal by the Korean Supreme Court was in January 2006.

On May 24, 2007, Plaintiff brought suit against Federal Bureau of Investigation Agent Marc Devittis ("Devittis"), United States Criminal Investigation Agent Mark F. Mansfield ("Mansfield"), Federal Bureau of Investigation Agent Seung Lee ("Lee"), and the Federal Bureau of Investigation ("FBI"). She alleged seven causes of action: 1) Fifth Amendment: coerced confession; 2) Fifth Amendment: deprivation of right to fair trial, wrongful extradition, and wrongful imprisonment; 3) Fifth Amendment: failure to intervene; 4) Fourth Amendment: false imprisonment; 5) Sixth Amendment: denial of right to counsel; 6) State Law Claim: fraudulent prosecution; 7) State Law Claim: outrage/intentional infliction of emotional distress.

On July 12, 2007, the United States filed the Motion to Dismiss and Substitute at issue. The Court will address each portion of the motion.

DISCUSSION

In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the United States Supreme Court disavowed the "no set of facts" language found in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957), previously used to evaluate complaints subject to 12(b)(6) motions. *Twombly*, 127 S. Ct. at 1969. In its place, courts must now look for "plausibility" in the complaint. This standard requires a plaintiff to set forth the "grounds" for an "entitle[ment] to relief" that is more than mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (internal quotation marks and citations omitted). Accepting the factual allegations in the complaint as true, the allegations "must be enough to raise a right to relief above the speculative level . . . ." *Id.* at 1965 (citations omitted). If the allegations in the complaint, assuming their truth, do

"not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 1966 (internal quotation marks and citations omitted). Two weeks after issuing its decision in *Twombly*, the Court emphasized in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" 127 S. Ct. at 2200 (quoting *Twombly*, 127 S. Ct. at 1964 (other citations and some internal quotations omitted). Thus, "a universal standard of heightened fact pleading" is not required, rather it is "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Iqbal v. Hasty*, 490 F.3d 143,157-58 (2d Cir. 2007) (italics original). It is under this revised standard that the Court will evaluate the motion at issue.

Bivens action against FBI (Counts I-V)

The Government first argues that *Bivens* actions are not permitted against the United States or its agencies and therefore that Counts I-V of the Complaint against the FBI must be dismissed for failure to state a claim upon which relief can be granted. *FDIC v. Meyer*, 510 U.S. 471 (1994). Therefore the Court GRANTS the motion to dismiss and DISMISSES the FBI from the suit.[1]

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[1] With respect to Counts I-V as against the individual officers, the United States indicated in its Reply that each Defendant

United States Substitution (Counts VI & VII)

The Government next contends that the state law claims for fraudulent prosecution and outrage/intentional infliction of emotional distress (Counts VI & VII) should have been brought against the United States under the Federal Tort Claims Act ("FTCA") as a result of the United States Attorney's Certification. The certification stated that Divittis, Lee, and Mansfield were acting within their scope of employment as employees of the United States during the alleged negligent acts.

Plaintiff responds that this Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343(a), as well as under the U.S. Constitution, and that this Court has jurisdiction over these claims based on supplemental jurisdiction under 28 U.S.C. § 1367(a). Plaintiff urges that Counts VI and VII state claims under the same set of circumstances as Counts I-V—namely, "Defendants' coercive interrogation of Plaintiff and the deprivation of her Constitutional rights which resulted directly from that illegal coercion." Pl. Response to U.S. Mot. to Dismiss and Substitute, p. 6-7. Additionally, Plaintiff argues that the state law claims do not predominate over the entire action and that there are no compelling reasons for the Court to decline jurisdiction. For these reasons, supplemental jurisdiction is appropriate; Plaintiff adamantly states that the claims were not brought under the FTCA.

The Fourth Circuit has made clear that the plaintiff must refute the certification of scope of employment

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will address those claims individually, which Defendant Lee has done. The Court notes that Defendants Mansfield and Divittis have not filed a responsive pleading but no return of service for any Defendants has been filed by Plaintiff.

and prove by a preponderance of the evidence that the individuals were not acting within the scope of employment. *Maron v. United States*, 126 F.3d 317 (4th Cir. 1997). Plaintiff here did not contest the certification, so the Court accepts that the employees were acting within the scope of employment.

The United States Supreme Court recently summarized the procedure for tortious claims against government employees in *Osborn v. Haley*, 127 S.Ct. 881 (2007). The Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA") gives federal employees absolute immunity from common law tort claims for actions taken in the course of their official duties. *Id.* at 887 *citing* 28 U.S.C. § 2679(b)(1). "When a federal employee is sued for wrongful or negligent conduct" the Attorney General, or a U.S. Attorney acting on behalf of the Attorney General, can "certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.'" *Id.* at 887-88 quoting 28 U.S.C. § 2679(d)(1),(2). After the Attorney General so certifies, "the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee." *Id.* at 888. Most importantly, "[t]he litigation is thereafter governed by the Federal Tort Claims Act." *Id.* Or, as worded by the Fourth Circuit, "the plaintiffs sole route for recovery is the Tort Claims Act."[2] *Maron*, 126 F.3d at 321.

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[2] There are exceptions to this rule that the FTCA is the exclusive remedy. 28 U.S.C. § 2679(b)(2) provides that the FTCA is "not the exclusive remedy for torts committed by Government employees in the scope of their employment when an injured plaintiff brings: (1) a *Bivens* action seeking damages for a constitutional violation by a Government employee; or (2) an action

Thus, although Plaintiff did not bring the claims for fraudulent prosecution and intentional infliction of emotional distress under the FTCA, the common law tort claims are effectively converted into claims under the FTCA. The federal employees have absolute immunity for the actions allegedly taken while they were performing official duties. Since the U.S. Attorney certified that they were acting in their scope of employment, the employees are dismissed from the action and the United States must be substituted as defendant for Counts VI and VII.

Despite the mandatory substitution, the U.S. may still be immune from suit for these causes of action. "Subject to certain exceptions, the FTCA permits a person injured by a Government employee acting within the scope of his or her employment to seek tort damages against the Government." *United States v. Smith*, 499 U.S. 160, 162 (1991). Under these exceptions, the U.S. has not waived its immunity and cannot be sued. *See* 28 U.S.C. § 2680. In cases "where the United States has not waived its immunity, the United States must still be substituted and the individual defendant still remains immune from suit if the tort occurred within the scope of employment. The plaintiff, despite the seeming unfairness, cannot proceed against the individual defendants." *Maron*, 126 F.3d at 321-22. As the Supreme Court noted, the language of the statute makes it clear "that Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes

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under a federal statute that authorizes recovery against a Government employee." *U.S. v. Smith*, 499 U.S. 160, 166-167 (1991); 28 U.S.C. § 2679(b)(2). The claims in Count VI and VII do not fall within either, so these exceptions are not applicable in this case.

foreclose a tort plaintiff's recovery altogether." *Smith*, 499 U.S. at 166.

One of the exceptions for which the United States has not waived its immunity is in cases that arise in a foreign country. *See* 28 U.S.C. § 2680(k). In their motion, the United States asserts that the torts here occurred in Korea, and therefore the exception applies such that the United States is absolutely immune from suit. The first state claim for fraudulent prosecution alleges that the Defendant Agents "initiated and continued a fraudulent prosecution without probable cause" against Plaintiff, made statements supporting her alleged culpability while knowing that the statements were based on a coerced confession, and that these malicious actions ultimately resulted in an acquittal in Plaintiff's favor. Complaint, p. 20. While the prosecution itself took place in Korea, the initiation of the prosecution began in the United States when Plaintiff was questioned, allegedly forced to confess, and extradited. The claim did not "arise in a foreign country" such that the United States is immune under 28 U.S.C. § 2680(k).

Like the cause of action for fraudulent prosecution, Count VII for outrage/intentional infliction of emotional distress did not occur in Korea. The complaint specifies that the defendants fabricated a story in an effort to solve a crime, causing severe emotional distress to Plaintiff. Complaint, p. 21. These alleged actions took place while the defendants were questioning the plaintiff—which took place in the United States. Thus the exception under 28 U.S.C. 2680(k) does not apply. Despite the fact that the United States is not immune from this Count, the cause of action is still subject to dismissal based on the exhaustion requirement.

Time & Exhaustion Requirements (Counts VI & VII)

The Government's final argument is that the Court does not have subject matter jurisdiction because the claims in Counts VI and VII are time barred and plaintiff did not exhaust the administrative remedies first. Also, the Government argues that Plaintiff cannot prevail on the claims because the pleadings are insufficient. In her response, Plaintiff acknowledges that she did not adhere to the administrative requirements necessary to file a claim under the FTCA. Pl. Response to U.S. Mot. To Dismiss & Substitute, p. 8, n. 4; *see* 28 U.S.C. § 2675(a).

As stated by the United States Supreme Court, "[t]he FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States*, 508 U.S. 106, 113 (1993). In a Fourth Circuit case in which the plaintiffs filed suit prior to a final judgment on their administrative claim, the Court noted that § 2675(a) requires either the claim be denied by the agency or that a six month period of time elapse prior to filing suit. *Plyler v. United States*, 900 F.2d 41, 42 (4th Cir. 1990); 28 U.S.C. § 2675(a). The Court held that because this final denial or time period did not elapse, "the district court was required at that point to dismiss for lack of jurisdiction." *Id.* The Court also noted that "the requirement of the filing of a claim by 28 U.S.C. § 2675(a) was 'jurisdictional and may not be waived.'" *Id. quoting Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986). "The justification for the strict enforcement of such statutes waiving statutory immunity. . . is because the right to sue the government exists only by virtue of § 2675, which fixes the terms and conditions on which suit may be instituted." *Id.* Therefore, it is clear that this Court

does not have jurisdiction over Counts VI and VII because Plaintiff has not exhausted the administrative remedies. Since the Court does not have jurisdiction, it also does not have the authority to stay the proceedings so Plaintiff can exhaust the adminsitrative remedies, as Plaintiff requests in a footnote of her Response. Pl. Response to U.S. Mot. To Dismiss & Substitute, p. 8, n. 4. For this reason, the Court need not address the statute of limitations issue or the failure to plead a plausible claim. The Court GRANTS the Motion to Dismiss for lack of subject matter jurisdiction both Counts VI and VII; those claims are DISMISSED without prejudice.

CONCLUSION

For the reasons above, the Court GRANTS the motion. Specifically, the Court GRANTS the United States' Motion to Dismiss and DISMISSES the FBI from the suit. The Court also GRANTS the United States' Motion for Substitution for Counts VI and VII, thereby replacing the individually named officers with the United States as Defendant for those claims. The Court then GRANTS the United States' Motion to Dismiss Count VI for fraudulent prosecution and Count VII for outrage/intentional infliction of emotional distress and DISMISSES those counts for failure to exhaust the administrative remedies.

The Court DIRECTS the Clerk to send a copy of this written Order and Opinion to counsel of record and any unrepresented parties.

ENTER: February 6, 2008

/s/ ROBERT C. CHAMBERS
ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed October 6, 2009]

No. 08-1414
(3:07-cv-00335)

KENZI NORIS ELIZABETH SNIDER,
Plaintiff-Appellee,

v.

SEUNG LEE, Federal Bureau of Investigation Agent,
Defendant-Appellant,

and

MARC DIVITTIS, Federal Bureau of Investigation Agent; MARK MANSFIELD, United States Army Criminal Investigation Division Agent; UNITED STATES OF AMERICA,
Defendants.

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is reversed. This case is remanded to the District Court for further proceedings consistent with the Court's decision.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA

[Filed May 24, 2007]

Case No. 3:07-0335
Judge #20497

JURY TRIAL DEMANDED

KENZI NORIS ELIZABETH SNIDER,
Plaintiff,

v.

Federal Bureau of Investigation
Agents MARC DIVITTIS, and SEUNG LEE;
United States Army Criminal Investigation
Division Agent MARK MANSFIELD and
THE FEDERAL BUREAU OF INVESTIGATION
Defendants.

COMPLAINT

NOW COMES Plaintiff, Kenzi Noris Elizabeth Snider, by her attorney, Northwestern University School of Law's Bluhm Legal Clinic, J. Samuel Tenenbaum, for her Complaint against Defendants, FEDERAL BUREAU OF INVESTIGATION AGENT MARC DIVITTIS ("DiVittis"), UNITED STATES ARMY CRIMINAL INVESTIGATION DIVISION AGENT MARK F. MANSFIELD ("Mansfield"), FEDERAL BUREAU OF INVESTIGATION AGENT

SEUNG LEE ("Lee"), and THE FEDERAL BUREAU OF INVESTIGATION states as follows:

Introduction

1. This is a civil rights action brought pursuant to the Judicial Code, 28 U.S.C. §§ 1331 and 1343(a); and the United States Constitution.

2. This Court has Jurisdiction of the action pursuant to 28 U.S.C. § 1331. Venue is proper under 25 U.S.C. § 1391(e). A substantial part of the events giving rise to the claims asserted herein occurred in this judicial district and the amount in controversy exceeds $75,000, excluding interest and costs.

3. This action seeks redress for the defendants' violations of rights secured to the plaintiff, Kenzi Noris Elizabeth Snider ("Ms. Snider"), by the United States Constitution.

4. Based exclusively on improper evidence created by Defendants, including a false confession that was the product of systematic psychological coercion, Ms. Snider was extradited to South Korea to stand trial for the March 17, 2001 murder of Jamie Penich, committed in Itaewon, South Korea.

5. Other than the coerced false confession, no evidence was developed or introduced tying Ms. Snider to the murder. In fact, physical evidence and eyewitness statements known to the defendants, but ignored by them at the time of their interrogation, strongly indicated Ms. Snider's innocence.

6. After reviewing the evidence surrounding Ms. Snider's interrogation and confession, the Seoul District Court acquitted Ms. Snider on June 19, 2003. However, because Korean law provides the prosecution a right to appeal, Ms. Snider was forced to

remain in Seoul until the Appellate Court affirmed her acquittal on October 14, 2003. Another appeal continued her jeopardy until the South Korean Supreme Court finally cleared Ms. Snider of all allegations related to the crime on January 13, 2006.

7. Between Seoul's Youngdeunpo Detention Center and the South Central Regional Jail in Charleston, West Virginia, Ms. Snider was incarcerated for more than fifteen months for a crime she did not commit. She was also involuntarily compelled to remain in Seoul for over four months awaiting the decision of the Korean Appellate Court.

Parties

8. Plaintiff Kenzi Snider is a 25 year old resident of Wayne County, West Virginia. She is a citizen of the United States.

9. Defendant Marc DiVittis was an FBI polygraph specialist stationed in Cleveland, Ohio at the time of the investigation.

10. Defendant Mark Mansfield was a Special U.S. Army Agent assigned to the Criminal Investigation Department in Seoul at the time of the murder. After working on the initial investigation in Seoul, Agent Mansfield traveled to the United States in February 2002 to interrogate Ms. Snider. Agent Mansfield had never worked on a homicide investigation before being assigned to the Penich case. At the time he was assigned to the case, he had been an agent for just ten months, four of which were spent in training.

11. Defendant Seung Lee was the FBI's legal attache, stationed at the U.S. Embassy in Seoul at the time of the murder. Bilingual (Korean/English), Agent Lee participated in the interrogation and

coercion of Ms. Snider in Huntington, West Virginia and met her in Korea upon her extradition. He assisted Korean police and prosecutors throughout their investigation leading up to Ms. Snider's trial. Agent Lee had never worked on a homicide investigation before being assigned to the Penich case.

12. Each of the individual defendants lacks immunity against the Plaintiffs claims because the facts alleged show the defendants' conduct violated several constitutional rights and these rights were clearly established at the time of the violation such that a reasonable agent would have known that his conduct violated the law.

13. At all times relevant to this action, each of the individual defendants acted in his official capacity and scope of employment, under the color of the laws, regulations and customs of the United States.

14. The Federal Bureau of Investigation ("FBI") is also a named defendant in this lawsuit. The FBI was responsible for preparing and assigning the individual defendants to interrogate Ms. Snider. The unconstitutional interrogation was performed in compliance with direct orders from the FBI.

15. The FBI's policy against recording interrogations contributed to the violations of Ms. Snider's constitutional rights. Additionally, adherence to that policy deprived fact-finders of essential information needed to assess the voluntariness and reliability of Ms. Snider's confession.

Factual Basis of Plaintiff's Claims

Murder of Jamie Penich

15. On March 18, 2001, Jamie Penich was killed in Itaewon, South Korea while traveling with class-

mates attending her study abroad program. Her nude body was found that morning in room 103 of the Kum Sung Hotel. The official cause of death stated by the Korean coroner was "suffocation." Ms. Penich was stomped to death.

16. Ms. Snider was one of the six students traveling with Ms. Penich. Ms. Snider met Ms. Penich two weeks prior to Ms. Penich's death.

17. The remaining five students traveling with Ms. Penich were: Ms. Anneloes Beverwijk, Mr. Jeroen Kuilman, Mr. Tuomas Heikkinen, Ms. Kati Peltomaa, and Ms. Elvira Makhmoutova. All seven students stayed at the Kum Sung Motel. Kati and Tuomas were dating, and occupied room 102. Jamie and Anneloes stayed in room 103, while Kenzi and Jeroen, who were not a couple, stayed in room 104. Elvira stayed in room 101 alone.

18. On March 17, 2001, the seven students ate dinner together at an Indian restaurant within walking distance of the motel.

19. After dinner, Ms. Snider, Ms. Penich, Ms. Beverwijk, Mr. Kuilman, and Ms. Makhmoutova went to Nickelby's Pub, while Ms. Peltomaa and Mr. Heikkinen returned to the motel.

20. While at Nickelby's, Ms. Penich and Ms. Snider were approached by several United States Army soldiers who were also members of a running club, known as a "hash club." They include: Nicholas Baer, Michael "Mick" Kolinski, Joshua Harlan, Chris Carrera, and a woman named Elizabeth. Ms. Snider also spoke with Vincent Heeney, who was a U.S. Army soldier but not part of the running club.

21. Ms. Beverwijk, Mr. Kuilman, and Ms. Makhmoutova left Nickelby's around 1:00 a.m., leaving Ms. Snider and Ms. Penich, who agreed to leave together later that night. They eventually left the bar together. Both had consumed alcohol, but Ms. Penich appeared more intoxicated than Ms. Snider, needing Snider's support to walk the few blocks back to the hotel.

22. Ms. Snider was awoken around 8 a.m. on March 18, 2001 by frantic pounding on her hotel room door. Ms. Beverwyk shouted through the door, "there's a body in my room and I can't find Jamie." Ms. Snider and Mr. Kuilman went with Ms. Beverwyk into room 103, where they saw Ms. Penich's dead body on the floor. The naked corpse was laying face up with a black item of clothing was covering the face. The students alerted Mr. Sin, the hotel owner, who called the police. The police identified the body as Ms. Penich's by a tattoo on her right shoulder.

Initial Investigation

23. During the week following the murder, the South Korean National Police questioned Ms. Snider and the other foreign students who had accompanied Ms. Penich to Seoul, the hotel owners, a Korean guest who arrived to the hotel around the time of the murder and several men who had spent time with Ms. Penich at Nickelby's the night of March 17, 2001.

24. These initial interviews yielded substantial information indicating that the victim was killed by one or two men.

25. Despite the weakness or absence of their alibis, the men with whom Ms. Penich had danced and

socialized at Nickelby's were only cursorily questioned by the South Korean investigators.

26. No one was charged and the murder was not solved by the South Korean National Police.

Political Pressure to Solve the Crime

27. On June 11, 2001, Ms. Penich's parents, Patty and Brian Penich, met with forensic pathologist Cyril Wecht to discuss the investigation of their daughter's murder. After speaking with the Penichs, Mr. Wecht relayed his concerns about the pace of the investigation to his former colleague and current United States Senator, Arlen Specter. Senator Specter was coincidentally preparing to participate in a congressional delegation to Seoul when Mr. Wecht contacted him regarding the Penich murder.

28. In August of 2001, Senator Specter traveled to Seoul and met with then-president Kim Dae-jung. Their conversation centered on the United States' refusal to negotiate with North Korea and the impact of that stance on South Korea. President Kim felt that North Korea posed an imminent threat to South Korea that could be reduced if the United States agreed to talk to North Korea about nuclear weapons.

29. At the end of their discussion, Senator Specter spoke to President Kim in private regarding the investigation of Ms. Penich's murder. Specter later recalled, "I asked President Kim if he would check on the progress of the investigation. Although he was not familiar with the case, he agreed to inquire about its status and work with the Korean police force and the American embassy staff on facilitating its swift resolution."

30. Senator Specter's visit created significant pressure on both the Korean police and the FBI to solve the crime. An FBI Agent later characterized the pressure following Specter's visit as "intense."

31. As the government agency that prepared and assigned the individual defendants to interrogate Ms. Snider, the FBI is responsible for the constitutional violations they committed in the course of that assigned duty. Further, the decision to assign two agents who had never before investigated a homicide, including one who had become a full agent only six months prior to the assignment, to the highly publicized and politically charged Penich case reflects the FBI's desire to quickly find a chargeable suspect, even at the expense of proper investigation and interrogation techniques. Finally, the FBI failed to intervene and prevent the coercion despite its ability to provide more experienced personnel to assist in Ms. Snider's interrogation.

Preparing to Coerce

32. A few weeks after Specter's meeting with President Kim, the United States Army renewed their efforts by assigning Agent Mark Mansfield to lead the investigation. Agent Mansfield was thirty-three years old but had spent only six months as a full Agent at the time he was assigned to the Penich case. Agent Mansfield had never worked on a murder investigation before this assignment.

33. Around that time, Thomas C. Hubbard, the United States Ambassador to South Korea, contacted FBI Special Agent Seung Lee, a bilingual Korean-American stationed at the U.S. Embassy in Seoul. Mr. Hubbard had received multiple letters from Brian and Patty Penich regarding the investigation

and was aware of Senator Specter's interest in the case. He asked Agent Lee to assist Agent Mansfield as a translator. Agent Lee had never worked on a murder investigation before this assignment.

34. When looking through the reports and statements, Agent Mansfield noticed a large boot print on the back of a copy of Ms. Snider's original statement given to Korean police the week of the murder. Hoping that the print was related to the content of the other side of the page, thereby somehow incriminating Ms. Snider, Agents Mansfield and Lee asked the Korean detectives who prepared the papers to explain the presence of the print. The detectives informed the Agents that in an attempt to isolate the type of shoe worn by the killer, they inked boots of different styles and sizes and pressed them to blank pieces of paper, keeping the prints that matched a bloody boot print found in the hallway outside room 103 of the hotel. They sent the other pages to the copy room to be recycled. One of the pages inked by a non-matching boot was later reused to copy Ms. Snider's statement. There was no correlation between the print and Ms. Snider. However, during the process of investigating this dead end, Agents Mansfield and Lee began to imagine Ms. Snider as a primary suspect. This thinking proved unfounded when the Korean detectives explained the coincidental print, but both Agents continued to focus on Ms. Snider, now knowingly without cause.

35. Agents Mansfield and Lee spent the next month or so brainstorming scenarios in which Ms. Snider killed Ms. Penich. They called their favorite idea "the lesbian angle." Though neither young woman was homosexual, the Agents theorized that they began kissing when Ms. Snider helped Ms.

Penich prepare to shower at the end of the night. Their sole basis for this concept was the hypothesis that the dancing and heterosexual kissing that had occurred earlier that night created a sexually charged environment conducive to homosexual experimentation.

36. Ms. Penich's nudity indicated that the murder was likely sexual in nature, but initial forensics reports indicating the presence of semen in her vagina, the brutal physical nature of the attack, and witnesses' claims of seeing and hearing men outside room 103 around the time of the murder strongly suggest that the sexual aggressor and murderer was a man.

37. Despite this information, Agents Mansfield and Lee presented "the lesbian angle" to FBI Behavior Analysis Unit Agent Mark Safarik. Agent Safarik noted that the unusual mode of killing—stomping—suggested that the killer was male because of the physical strength required to subdue the victim and inflict the necessary damage.

38. Agent Lee described his mindset prior to meeting Agent Safarik by noting, "I had a simple agenda. I wanted to know if what we were thinking was foolhardy or a legitimate possibility. Did they have to be very much of a homosexual to do what we think happened?"

39. Agent Lee described his view after the meeting: "I walked away from that meeting thinking that we weren't doing anything totally stupid . . ."

40. Agents Mansfield and Lee arranged to interview Ms. Snider at the Ramada hotel in Huntington, West Virginia on February 4, 2002 to confront her with the "lesbian angle." FBI Agent Marc DiVittis, a

polygraph expert who had no knowledge of the case, met them at the hotel to administer a polygraph examination to Ms. Snider if she proclaimed her innocence.

The Coerced Confession

41. The defendant FBI agents interrogated Ms. Snider on three occasions: Feb 4, 5, and 6, 2002. Each interview was conducted at the Ramada Hotel in Huntington, West Virginia.

42. None of the interrogation sessions were recorded in any format.

43. The defendant agents planned and executed a psychologically coercive interrogation over those three days.

44. Presenting himself as "more of a counselor than an investigator" on the first day, Agent DiVittis and the other defendants concentrated on unrelated small-talk. Their only reference to the murder focused on how difficult life must be for the killer and the emotional release sure to follow his/her confession. Ms. Snider agreed that seeking peace of mind would be a good reason for the killer to confess.

45. They also led Ms. Snider to believe that a person charged with Ms. Penich's murder would not face serious penalties due to the difficulties of extradition to Korea. If extradited, Agent Lee claimed, the killer would not receive a harsh penalty and would be treated better than the average prisoner in a Korean prison.

46. Despite these comments, it was never indicated on February 4th that Ms. Snider was suspected of committing the crime.

47. At the agents' request, Ms. Snider wrote all she recalled of the night of the murder during the night of February 4th and returned with this handwritten account the following afternoon. This handwritten recollection, completed before the agents introduced "the lesbian angle," indicated Ms. Snider's innocence.

48. On the second day of interrogation, the agents reaffirmed their friendly rapport with Ms. Snider over ice cream that Ms. Snider brought to share with them. The agents' demeanor shifted, however, as they confronted Ms. Snider with what they claimed were inconsistencies in her account of the night of the murder. When it became clear to Ms. Snider that she was being interrogated as a suspect, she asked if she needed a lawyer. The agents replied that a lawyer would only make things harder on her, claiming that they would be unable to view her as cooperative if she insisted upon a lawyer's presence and that it was in her best interest to cooperate with them without a lawyer present. She did not contact a lawyer throughout the interrogation.

49. Next, the agents discussed the phenomenon of "repression" with Ms. Snider. The agents asserted that repression allows the mind to remove certain events from one's conscious memory in order to avoid the pain caused by cognizance of those events. Ms. Snider had been exposed to similar misinformation during high school. The Defendant Agents successfully convinced Ms. Snider that repression was a known and widely accepted mental phenomenon, when, in fact, it was not.

50. As Ms. Snider attempted to uncover her "repressed" memory of the night of the murder, the interrogation grew hostile. Though Ms. Snider was

crying and under visible and significant emotional duress, the agents shouted at her, calling her a liar. They continued to insist that her inability to recall murdering Ms. Penich was explained by repression. They also insisted that Ms. Snider and the victim had a sexual encounter which caused Ms. Snider to experience deeply rooted anxiety. Their theory hinged on the fabrication that Ms. Penich attempted to unfasten the button on Ms. Snider's pants, evoking intense rage within Ms. Snider related to an early childhood experience. Ms. Snider could not recall specifics of this alleged altercation; all relevant portions of the story were relayed to her in form of leading questions and disturbing crime-scene photos shown to her by the defendant agents.

51. The agents then claimed that they believed the killer felt remorse after committing the crime in an effort to convince Ms. Snider that the killer wasn't as morally culpable as the crime scene would otherwise indicate. They pointed to a cloth placed over the victim's face and a rag used to wipe up blood found at the scene as evidence of this remorse. The defendants implied that due to these items, they didn't view the murder as an intentionally evil or cruel act. Instead, they suggested that it was likely an accident; the result of factors beyond the control of both the killer and the victim.

52. Led to distrust the reliability of her actual memory and misunderstand the impact of a confession, Ms. Snider finally accepted the version of the murder proffered by the defendants. The agents then reassured Ms. Snider that she would still be able to become a teacher, that everything would be fine and that they believed her to be a good person.

53. In addition to misleading her about the nature of psychological repression, the defendants lied to Ms. Snider about her right to a lawyer and the implications of a confession. They also manipulated her perception of the crime by minimizing the moral culpability of the killer.

54. The Defendants also failed to read Ms. Snider her *Miranda* rights until February 28, 2002, three weeks after they coerced her confession during an incommunicado interrogation in a police-dominated atmosphere.

Extradition Hearing

55. On February 28, 2002, extradition proceedings were initiated before The United States District Court for the Southern District of West Virginia at Huntington. From that day until December 18, 2002, Ms. Snider was confined at the South Central Regional Jail in Charleston, West Virginia.

56. Based solely on her coerced confession, Ms. Snider was found extraditable by the Honorable Maurice G. Taylor, Jr. Magistrate Judge Taylor held that pursuant to the treaty between the United States and the Republic of Korea signed June 9, 1998, effective December, 1999, Korea satisfied its burden of establishing probable cause to believe that Ms. Snider murdered Ms. Penich.

57. On October 9, 2002, Magistrate Taylor approved Ms. Snider's extradition.

58. Ms. Snider arrived in Seoul on December 20, 2002. After spending ten days in custody at the local police station, she was moved to solitary confinement in a four-by-seven foot cell at the Youngdeungpo Detention Center for the following six weeks. She

was then moved into a different cell which she shared with nine to fourteen other women for the following five months. Ms. Snider and the other women in this cell slept next to one another on blankets on the stone floor. During this time Ms. Snider, like all South Korean prisoners, was forced to wear a colored patch on her uniform that indicated the crime with which she had been charged. Her patch was yellow, for murder. In transit to and from court, Ms. Snider was tied in elaborately knotted thick ropes which were also color-coded to indicate her alleged crime.

59. Ms. Snider's lawyer understood little English and brought his daughter to help translate during their meetings. Key components of Ms. Snider's defense strategy may have been lost in translation.

Ms. Snider's Exoneration and Release

60. On June 19, 2003, Ms. Snider was acquitted by the Seoul District Court.

61. On October 14, 2003, a three-judge appeals court upheld Ms. Snider's acquittal.

62. On January 13, 2006, the Korean Supreme Court upheld Ms. Snider's acquittal for a second time, finally ending her nearly four-year odyssey of wrongful imprisonment and trials.

Injuries Suffered by Plaintiff as a Result of Defendants' Actions

63. Each of the preceding paragraphs of this Complaint is incorporated as if restated fully herein.

64. The actions of the Defendant Agents were the direct cause of Ms. Snider's injuries and consequential damages, including, but not limited to: (1) the loss of almost two years of her life, including lost opportunity to complete undergraduate degree pro-

gram and lost income; (2) subjection to extradition, trial, and incarceration in a foreign country for a crime for which she has been acquitted three times; (3) the extreme and arduous conditions associated with confinement in prison, including mental anguish, humiliation, degradation, isolation, loss of freedom and other physical and emotional pain and suffering; (4) continuing psychological effects since her incarceration; and (5) loss of her good name and reputation.

COUNT I—5th Amendment
Coerced Confession

65. Each of the preceding paragraphs of this Complaint is incorporated as if restated fully herein.

66. As more fully described above, the Defendant Agents, pursuant to the training and policy of the Federal Bureau of Investigation, individually, jointly, and in conspiracy fabricated a story of Ms. Snider's guilt and coerced her into distrusting her actual memory and adopting their fabrication as truth.

67. The interrogation conducted by the Defendant Agents included psychological methods of coercion designed to overbear Ms. Snider's free will. It resulted in an involuntary statement of guilt which constituted the primary evidence used against Ms. Snider in subsequent hearings and ultimately resulted in Ms. Snider's wrongful extradition and imprisonment.

68. The Defendant Agents were clothed with the Authority of the United States of America and purported to be lawfully exercising their official power while in reality abusing it.

69. This misconduct deprived Ms. Snider of the privileges or immunities secured by the 5th Amend-

ment to the Constitution of the United States as well as the laws of the United States.

70. As a result of Defendants' psychologically coercive tactics, Plaintiff suffered great mental anguish, humiliation, degradation, emotional pain and suffering and other consequential damages more fully described above.

71. The misconduct described in this Count was undertaken with malice, willfulness, and reckless indifference to the constitutional rights of the Plaintiff.

COUNT II—5th Amendment
Deprivation of Right to Fair Trial, Wrongful Extradition and Wrongful Imprisonment

72. Each of the preceding paragraphs of this Complaint is incorporated as if restated fully herein.

73. As described in detail above, the Defendant Agents, all while acting individually, jointly, and in conspiracy, as well as under color of law and within the scope of their employment, and the Federal Bureau of Investigation, acting under color of law, deprived Ms. Snider of her constitutional right to a fair trial.

74. In the manner described more fully above, the Defendant Agents deliberately fabricated and coerced false admissions and reports which formed the basis for extraditing, charging, prosecuting and imprisoning Ms. Snider.

75. The FBI facilitated the constitutional violations committed by the Defendant Agents by preventing them from recording the interrogation. The Defendant Agents knew that their conduct during the interrogation and the content of Ms. Snider's confession would likely be contested in court, yet delibe-

rately chose, pursuant to FBI practice and policy, to conceal the precise content of Ms. Snider's confession and the nature of their conduct during the interrogation from fact-finders by not recording the interrogation.

76. The misconduct of the Defendant Agents and the FBI resulted in the wrongful extradition and conviction of Ms. Snider, thereby denying her Constitutional right to a fair trial and to fair appeals thereof in violation of the Due Process Clause of the 5th Amendment of the United States Constitution.

77. Under *Bivens,* the Defendant Agents and Agency stand liable for damages to Ms. Snider resulting from the deprivation of her 5th Amendment Due Process right to a fair trial, her wrongful extradition and her wrongful imprisonment.

78. The misconduct described in this Count was objectively unreasonable, was undertaken intentionally with willful indifference to Ms. Snider's constitutional rights, and was undertaken pursuant to the practice and policy of the Federal Bureau of Investigation.

COUNT III—5th Amendment
Failure to Intervene

79. Each of the preceding paragraphs of this Complaint is incorporated as if restated fully herein.

80. In the manner described above, during the coercive interrogation of Ms. Snider, the Defendant Agents stood by without intervening to prevent the misconduct, coercion and clear emotional distress to which Ms. Snider was subjected.

81. As a result of the Defendants' failure to intervene to prevent the violation of Plaintiff's constitu-

tional rights, Plaintiff suffered pain and injury, as well as emotional distress.

82. The Defendant Agents had knowledge or had reason to know of Ms. Snider's innocence and therefore of the coercive nature of the interrogation. They had a realistic opportunity to intervene to prevent the harm from occurring, but failed to do so.

83. The misconduct described in this Count was objectively unreasonable and was undertaken with willful indifference to Ms. Snider's constitutional rights.

84. The misconduct described in this Count was undertaken pursuant to Federal Bureau of Investigation's policy and practice, including a training procedure lacking any instruction on avoiding false confessions or techniques likely to cause false confessions. The FBI was aware of, directly encouraged, and condoned the practices described in this Count, facilitating a failure to intervene.

COUNT IV—4th Amendment
False Imprisonment

85. Each of the preceding paragraphs of this Complaint is incorporated as if restated fully herein.

86. As described more fully above, the actions of the Defendant Agents, all while acting jointly, and in conspiracy, as well as under color of law and within the scope of their employment, caused Ms. Snider to be falsely imprisoned for fifteen months in West Virginia and South Korea for a crime she did not commit, in violation of Ms. Snider's constitutional right to be free from unreasonable seizures.

87. Ms. Snider was also involuntarily compelled to remain in Seoul for over six months after she was

acquitted by the trial court awaiting the decision of the Korean Appellate Court.

88. Under *Bivens*, the Defendant Agents and Agency stand liable for damages to Ms. Snider resulting from the deprivation of her 4th Amendment right to be free from unreasonable seizures.

COUNT V—6th Amendment
Denial of Right to Counsel

89. Each of the preceding paragraphs of this Complaint is incorporated as if restated fully herein.

90. As described more fully above, one or more of the Defendants, all while acting individually, jointly, and in conspiracy, as well as under color of law and within the scope of their employment, denied Plaintiff her constitutional right to counsel.

91. As a result of these violations, Plaintiff suffered injuries, including but not limited to emotional distress, as is more fully described above.

92. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally with willful indifference to Plaintiff's constitutional rights.

93. The misconduct described in this Count was undertaken pursuant to the intent, policy and practice of the Federal Bureau of Investigation in the manner more fully described above.

COUNT VI—State Law Claim
Fraudulent Prosecution

94. Each of the preceding paragraphs of this Complaint is incorporated as if restated fully herein.

95. As described more fully above, the Defendant Agents, all while acting jointly, and in conspiracy, as

well as under color of law and within the scope of their employment initiated and continued a fraudulent prosecution without probable cause against Ms. Snider.

96. The Defendant Agents accused Ms. Snider of criminal activity while knowing those accusations to be without probable cause and made statements to prosecutors with the intent of exerting influence to institute and continue judicial proceedings against Ms. Snider.

97. The Defendant Agents made statements supporting Ms. Snider's alleged culpability with knowledge that such statements were based on a fabricated and coerced confession obtained by their own misconduct.

98. The prosecution against Ms. Snider was ultimately terminated in Ms. Snider's favor. Three different courts reached this result.

99. The misconduct described in this Count was undertaken with malice, willfulness and wanton and reckless disregard for the welfare of the Plaintiff and the general public.

100. As a direct result of these unlawful actions, Ms. Snider was extradited to Korea where she was imprisoned awaiting trial and subjected to continued jeopardy during appeals that spanned nearly three years.

101. As a direct result of this fraudulent prosecution, she has suffered actual, special, and general damages, the exact nature and amount of which will be shown according to proof at time of trial.

COUNT VII—State Law Claim
Outrage/Intentional Infliction of Emotional Distress

102. Each of the preceding paragraphs of this Complaint is incorporated as if restated fully herein.

103. As described more fully above, the Defendant Agents, all while acting jointly, and in conspiracy, as well as under color of law and within the scope of their employment, intentionally and recklessly inflicted severe emotional distress upon Ms. Snider.

104. The Defendant Agents intended to cause, or were in reckless disregard of the probability that their conduct would cause, severe emotional distress to Ms. Snider, as is more fully alleged above.

105. The actions of the defendants, specifically, fabricating a story of repressed sexual trauma erupting into a horrifically violent act in an effort to solve a crime without regard to the overwhelming available physical and circumstantial evidence surrounding the crime, were so outrageous in character and extreme in degree as to go beyond all bounds of decency and regarded as utterly intolerable in a civilized community.

106. These acts and conduct of the Defendant Agents directly caused severe emotional distress to Ms. Snider and thereby constituted intentional and reckless infliction of severe emotional distress, causing Ms. Snider to suffer injuries and damages in the form of, but not limited to, severe emotional distress and anguish, depression, sadness, anxiety, fear, and sleep disruptions.

WHEREFORE, Plaintiff Kenzi Noris Elizabeth Snider respectfully prays that this Court enter judgment on all of the above counts in her favor and

against the Defendants and award the following relief:

(1) Compensatory damages in an amount to be determined at trial but above $75,000.00;

(2) Punitive damages against the Defendant Agents in their individual capacities;

(3) Attorneys fees and costs; and

(4) Such further and additional relief as this Court shall deem equitable and just.

Dated: May15, 2007

Respectfully Submitted,

/s/ J. Samuel Tenenbaum
J. Samuel Tenenbaum
Northwestern University
Bluhm Legal Clinic
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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINA
AT HUNTINGTON

[Entered Oct 11, 2002]

MISCELLANEOUS NO. 3:02-M-0030

IN THE MATTER OF THE EXTRADITION OF
KENZI NORIS ELIZABETH SNIDER

MEMORANDUM AND ORDER

Kenzi Noris Elizabeth Snider is a United States citizen whose extradition is sought by the Republic of Korea pursuant to 18 U.S.C. § 3184 and an extradition treaty entered into between the Government of the United States and the Government of the Republic of Korea. The treaty was signed on June 9, 1998 and became effective in December of 1999. Extradition is being sought on the basis of a charge of murder, a warrant having been issued for Ms. Snider's arrest by a Korean Judge on February 27, 2002 in which she is charged with the murder of Jamie Lynn Penich, also an American citizen.

Proceedings were initiated in this Court on February 28, 2002, with the filing of a complaint by the United States on behalf of the Republic of Korea seeking the provisional arrest of Ms. Snider. An arrest warrant was issued by the Court, and Ms.

Snider was arrested on that same day.[1] A motion to detain was filed by the United States on March 1, 2002, and, following a hearing on the motion, bond was denied and Ms. Snider was ordered detained pending a hearing on the request for extradition.

On April 24, 2002, the Republic of Korea submitted a diplomatic note to the Department of State formally requesting the extradition of Kenzi Noris Elizabeth Snider. The request was supported by a quantity of documents, including *inter alia*, a copy of the arrest warrant issued in Korea, documents memorializing oral confessions of Ms. Snider to the murder of Jamie Lynn Penich, written confession signed by Ms. Snider, and reports of the investigation of the murder and the interrogation Ms. Snider prepared by officials of the government of the United States. In conformity with the requirements of 18 U.S.C. § 3190, the documents submitted by the Republic of Korea were certified by Richard C. Hermann, Consul General of the United States of America in Seoul and the principal consular officer of the United States in Korea.

The Republic of Korea seeks Ms. Snider's extradition to face a charge of murder in violation of Paragraph 1, Article 250 of the Korean Criminal Code, stemming from the slaying of Jamie Lynn Penich in Seoul on March 18, 2001. The evidence before the Court consists of the documents accompanying the request for extradition and testimony taken and exhibits submitted at the extradition hearing. Having reviewed the documents submitted with the request for extradition, heard the testimony and examined

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[1] Counsel was appointed by the Court to represent Ms. Snider on March 1, 2002, and Edward H. Weis, Assistant Federal Public Defender, has represented her from the time of her arrest.

the exhibits tendered as the extradition hearing, and reviewed the submissions from counsel for the United States on behalf of the Republic of Korea and from counsel for Ms. Snider, the Court concludes that the Republic of Korea has satisfied its burden of establishing probable cause to believe that Kenzi Noris Elizabeth Snider murdered Jamie Lynn Penich. The Court, accordingly, finds that Ms. Snider is extraditable.

Extradition proceedings are frequently described as being *sui generis*, and it is apparent that the responsibility of the court in the extradition process, characterized as "an executive, not a judicial function,"[2] differs significantly from the adjudicative process normally encountered. Thus, far from the usual "final judgement" resolving matters in difference between the parties, in extradition proceedings the court, if it finds that treaty and statutory requirements are met, certifies this finding, together with the record in this case, to the Secretary of State. 18 U.S.C. § 3184. Thereafter decision on whether to surrender the fugitive "rests in the discretion of the Secretary of State."[3]

While similarity to preliminary hearings is often noted, the consequences of a finding that an accused extraditable differ significantly from a finding of probable cause following preliminary hearing in a criminal case, and rules concerning relevancy and and admissibility differ dramatically. As a general rule, "explanatory evidence," described as "reasonably clear-cut proof which would be of limited scope

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[2] *Martin v. Warden Atlanta Pen*, 993 F.2d 824, 828 (11th Cir. 1993).

[3] *In re United States*, 713 F.2d 105, 108 (5th Cir. 1983).

and have some reasonable chance of negating a showing of probable cause," is relevant and admissible. *In re Extradition of Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978). As phrased more bluntly in an oft quoted opinion, "what tends to obliterate probable cause may be considered but not what merely contradicts it." *Shapiro v. Ferrandina*, 355 F. Supp. 563, 572 (S.D.N.Y 1973). In conformity with these structures, evidence of alibi, evidence relating to credibility, evidence contradicting a requesting party's proof and evidence in defense, such as insanity, have been excluded in extradition proceedings.[4]

While recognizing the dissimilarities, it is, nevertheless, established that, unless the applicable treaty provides otherwise,[5] the standard to be employed in determining whether the requesting party has satisfied its burden[6] is the standard of probable cause, a

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[4] *See generally, Charlton v. Kelly*, 229 U.S. 447, 461-62 (1913); *Collins v. Loisel*, 259 U.S. 309, 315-17 (1922); *In re Extradition of Powell*, 4 F. Supp. 2d 945, 957-58 (S.D. Cal. 1998); *Matter of Extradition of Lehming*, 951 F. Supp. 505, 514-15 (D. Del. 1996); *In re Extradition of Singh*, 123 F.R.D. 108, 110-11 (D. N.J. 1987); *In re Extradition of Koskotas*, 127 F.R.D. 13, 25 (D. Mass. 1989).

[5] The extradition treaty between the United States and the Republic of Korea requires that a request for extradition be supported by "such information as would provide reasonable grounds to believe that the person sought has committed the offense for which extradition is requested."

[6] To certify that a fugitive is subject to extradition, it must be established that: (1) the court has jurisdiction to conduct the extradition hearing and jurisdiction over the accused; (2) the accused is sought for extradition for crimes covered by the treaty; and (3) there is probable cause to believe that the person detained is the fugitive whose extradition is sought and that he or she committed the offense charted. *In re Extradition of Garcia*, 188 F. Supp. 2d 921, 925 (N.D. Ill. 2002). In this case,

standard applied in "'preliminary examinations, which take place everyday in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused . . . upon the charge against him.'" *Charlton v. Kelly*, *supra* at 460 (quoting *Benson v. McMahon*, 127 U.S. 457, 463 (1888)). Accordingly, under the standard applicable in this proceeding, the Court is required to determine whether the evidence is "'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.'" *United States v. Wiebe*, 773 F.2d 549, 553 (8th Cir. 1984).[7] An extradition proceeding, it bears emphasizing, is not held for the purpose of determining Ms. Snider's guilt. It is neither a trial nor a dress rehearsal for a trial, and the court does not examine

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only the question of existence of sufficient evidenceto establish probable cause to believe that Ms. Snider committed the offense is in dispute, the parties having agreed that all other requirements for certification are established.

[7] The standard is formulated in various ways. In *In re Extradition of Medina*, 210 F. Supp. 2d 813, 817 (N.D. Tex. 2002), the court described probable cause as "the existence of reasonable grounds to believe the accused committed the offense charged," pointing out that probable cause does not require convincing evidence of actual guilt." In *Collier v. Vaccaro*, 51 F.2d 17, 20 (4th Cir. 1931), the court noted that the committing magistrate was "to determine whether upon the evidence adduced before him there is reasonable ground to believe that the crime charged has been committed" by the accused. Conversely, more that an opportunity to commit a crime, presence in a particular place, surmise or suspicion must be established, and, ultimately, the committing magistrate "must judge for himself the persuasiveness of the facts relied on . . . to show probable cause." *Giordenello v. United States*, 357 U.S. 480, 486 (1958).

the evidence to determine whether it is sufficient to justify a conviction. The Court's responsibility, as noted, is to determine whether the evidence presented establishes a reasonable belief of Ms. Snider's guilt of the crime charged, and that determination, unlike in most judicial proceedings, is made following a hearing in which the Federal Rules of Criminal Procedure and the Federal Rules of Evidence are not applied,[8] hearsay is admissible and rather stringent limitations are placed on the kinds of evidence a fugitive can present.

In this case the evidence includes testimony describing oral confessions of Ms. Snider and a confession signed by her in which she describes the manner and means by which she murdered Jamie Lynn Penich in Seoul, Korea, on March 18, 2001. Details in the confessions were corroborated by the facts disclosed during the investigation of the murder. Her initial confessions, an oral and signed confession, were made in a non-custodial setting. She is a well educated individual, and there is no evidence in the record before this Court that she suffers from psychological or other problems which might have caused her to confess falsely. Her third and final confession to the murder was given nearly a month after the initial confessions, and, while it was given at a time when she was in custody, she was advised that she was not required to speak to the F.B.I. Agents interviewing her, that her statements could be used against her in court, that she had the right to a lawyer, including appointed counsel, before she spoke to the agents, that and she could stop answering at any time. Absent other evidence, the evidence concerning the confessions would clearly establish probable

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[8] *See*, Fed. R. Crim. P. 54(b)(5); Fed. R. Evid. 1101(d)(3).

cause to believe that Ms. Snider murdered Jamie Lynn Penich as charged in the Korean warrant. The Court must, however, evaluate all the evidence in determining the weight to be given the confessions, and, if it were determined that the confessions were in any manner coerced, little, if any, weight could be given to the admissions of guilt. In this case, it is argued that the initial confessions were, in some sense, "coerced," and support for the argument is said to be found in the evidence with respect to the interrogation of Ms. Snider, as well as the testimony of Ms. Snider at the hearing and the testimony of an expert witness testifying on her behalf, Dr. Richard J. Ofshe.[9] Consideration of this evidence and the argument made with respect to the reliability of the confession, however, does not alter the Court's view. In reaching this conclusion, the Court has evaluated the facts, particularly those surrounding the initial oral confession, under standards applied in federal criminal proceedings for determining voluntariness of confessions, i.e., "'whether the confession was "extracted by any sort of threats of violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence."'" *United States v. Braxton*, 112 F.3d 777, 780 (4th Cir. 1997) (quoting, *Hutto v. Ross*, 429 U.S. 28, 30 (1976)). Additionally, the Court has simply

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[9] A motion to exclude Dr. Ofshe's testimony was filed prior to the hearing. That motion was denied by the Court as the hearing began. In light of the Court's findings, further consideration of the motion is not warranted. For present purposes, the Court would simply note that while Dr. Ofshe's testimony was considered, that testimony, under the facts presented and the limitations involved in extradition proceedings, was not of significant assistance in understanding the evidence or resolving the issues presented.

evaluated the facts presented in terms of persuasiveness and reliability.[10] Analyzing the facts in light of constitutional standards and on the basis of reliability, the Court has concluded that the evidence presented on behalf of the Republic of Korea is sufficiently reliable and of sufficient weight to satisfy the standard of probable cause. While there appears to be no dispute about the fact that difficulties with extradition and a sentence imposed in a case involving the murder of a prostitute in Korea by an American soldier were discussed on the day prior to Ms. Snider's initial confession, neither explicit nor implicit promises of leniency or other improper influence is established by the evidence. Similarly, the evidence presented does not establish that Ms. Snider's will was "overborne" of that her "capacity for self determination [was] critically impaired," *Id.*, by the manner in which she was interrogated. Insofar as Dr. Ofshe's testimony is concerned, it is not at all clear that his opinions can be related to the facts as they appear in the record before the Court, and those opinions, in the present context, simply do not cause the Court to question its finding of probable cause. Finally, Ms. Snider's testimony, while clearly relevant to issues involved in a trial setting, provides no basis for concluding that probable cause is not established.

Based on the foregoing, I conclude that the Republic of Korea has satisfied the documentary and other procedural requirements of the Extradition Treaty and has sustained its burden of establishing probable

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[10] The Court finds the testimony of the witnesses presented on behalf of the Republic of Korea credible. It should also be noted that in many relevant respects the testimony of Ms. Snider did not conflict with the testimony of the witnesses.

cause to believe that Kenzi Noris Elizabeth Snider committed the alleged violation of Paragraph I, Article 250 of the Korean Criminal Code by murdering Jamie Penich.

Pursuant to 18 U.S.C § 3184, I am prepared to certify to the Secretary of State that all of the legal prerequisites detail for extradition have been met. The United States shall submit to the Court proposed Orders for certification and commitment under 18 U.S.C. § 3184. The parties site advised that, at the time of entry of the Court's orders for certification and commitment, the Court will further order that removal of Kenzi Noris Elizabeth Snider shall be stayed for a period of thirty days to permit her to file any application for a writ of habeas corpus.

The Clerk is directed to mail a copy of this Order to Kenzi Noris Elizabeth Snider, all counsel of record, the Probation Office and the United States Marshal.

ENTERED:

/s/ Maurice G. Taylor, Jr.
MAURICE G. TAYLOR, JR.
United States Magistrate Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINTON

MISC NO. 3:02-MC-30
MARCH 11, 2002

IN THE MATTER OF THE EXTRADITION OF
KENZI NORIS ELIZABETH SNIDER

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE MAURICE G. TAYLOR, JR.
UNITED STATES DISTRICT MAGISTRATE JUDGE

APPEARANCES:

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These proceedings were reported with use of a stenographic machine and transcribed with use of computer-aided transcription

* * *

that?

MR. WEIS: That is correct. Nor is there a dispute about dual criminality, that being the other. I think that was clear from, really, the very beginning of our filing discovery motions and that sort of thing.

Type B blood was found in the entranceway to the hotel. Type B blood is the type of blood which the victim had.

The witness who may or may not have made an erroneous identification of the particular individual said that the individual she saw leaving the room around the time of the murder had blood on the cuffs of his pants.

There is no explanation in any of Ms. Snider's statements as to how she would have gotten blood—and it's a bloody scene—how she would have gotten blood in the entranceway of the hotel.

This murder did not go unnoticed. The morning after the body was discovered, she and all the other exchange students were questioned, of course, gave statements, saw each other, were seen by the police.

Had there been any suspicion on Ms. Snider, surely—and any reason to suspect Ms. Snider, surely things would have happened differently than they did.

Had there been any sign of blood on her pants or her shoes, surely things would have happened differently than they did.

* * *

contact information, to take some photographs, fingerprints, get her full biographical data in case I needed to contact her at a later date.

Q. You said February 6th. Is that of this year?

A. Yes, that's correct.

Q. And where did you obtain this contact information?

A. It was at the Ramada Limited here in Huntington.

Q. What was the next occasion on which you interviewed Miss Snider?

A. March 1st of this year. She was in custody, and I interviewed her here at the courthouse in the United States Marshal's holding cell.

Q. Had she been arrested?

A. Yes, she had.

Q. Do you know who arrested her?

A. Myself and several other FBI agents.

Q. When did you arrest her?

A. The night before.

Q. Tell us about that interview on March the 1st. Where was it and who was present?

A. Myself and Special Agent James Harper of the FBI were present at the interview. It was here in Huntington. It was a custodial interview.

So the first thing that we did after I introduced Agent Harper to Miss Snider was to read her her rights on a *Miranda* rights waiver sheet

I read her the rights portion of the sheet and then had her read back the waiver portion. She then signed the rights waiver sheet and agreed to an interview.

Q. Did she sign—

THE COURT: Which date is this? Which date are we talking about?

MR. WRIGHT: March the 1st, Your Honor.

THE COURT: March the 1st. All right.

BY MR. WRIGHT:

Q. Did she sign that in front of you?

A. Yes, she did.

Q. And did you witness it with your signature?

A. Yes, I did. And Agent Harper also witnessed it.

Q. Okay. Have you reviewed a copy of the extradition package which has been filed with the Court?

A. Portions of it, yes.

Q. Do you know whether or not the waiver form is a part of that package?

A. Yes, it is.

Q. It is behind Annex 5?

A. Yes, it is.

Q. After waiving her *Miranda* rights, what was discussed? What happened?

A. I asked Miss Snider to give me a statement covering the

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polygraph to see if she passed or failed the polygraph.

I knew there had been some inconsistencies discovered in her statements when they reviewed them and that they had some questions they wanted to ask her about that. And that's really the extent of my knowledge prior to the interviews that they had here.

Q. You didn't know that there was a lot of political pressure placed to try to solve this case, did you?

A. I understood that, yes

Q. And this interview was part of the efforts to solve the case.

A. Yes, sir. Every interview we do is.

Q. And in this case it was an interview of someone who was already suspected; is that right?

A. I knew that there were inconsistencies in her statement that they wanted to review, and I knew that she was a suspect, yes.

Q. In your interview of Ms. Snider, you told us that at the point where she entered the room, two things happened.

One is her demeanor changed and also that she made a remark about having trouble distinguishing between what others had told her and what she remembered; is that correct?

A. That's correct.

Q. Going back now to the point—the part of the interview before her demeanor changed, before she enters the room, she

* * *

A. Yes, I did.

Q. —or questioning.

A. It was an interview. Yes.

Q. All right. And my copy, unfortunately, has been through, I think, two fax machines. So it's difficult to read. But my copy reads, I believe, "Snider paused at this point in the interview and stated that it was beginning to be difficult to distinguish between what others—what she remembered and what she had been told by others. Snider then resumed the interview."

That's what you put in your report, isn't it?

A. That's correct.

Q. You didn't put in the report anything about *Stars and Stripes.*

A. No, sir, I did not. It's not a verbatim transcript of an interview. It's a summary. It includes informa-

tion that the interviewer believes is important to the interview.

I also didn't put in her exact words—although they're in my notes in quotes—that "This is the hard part."

She recalled—she said—as I recall, her exact words were, "This is the hard part." Agent Harper and I looked at her probably strangely because we didn't understand and asked for some explanation.

And she said, "Well, it's beginning to be difficult for me to understand—to tell the difference between what I recall happened in the room with Miss Penich and what I had found out subsequent to that interview or subsequent to that occurrence."

Q. You put in your report, though, "what she had been told by others," didn't you?

A. Yes, sir, that's correct, what she had been told, what she had read.

Q. So far as you know, what she did with *Stars and Stripes* was read it, correct?

A. As far as I know, that's correct.

Q. *Stars and Stripe's* doesn't tell you anything, does it?

A. No, sir, it does not.

Q. People tell you other things, don't they?

A. Yes, sir, they do.

Q. People like people who are conducting interrogations.

A. Yes, sir, or interviews.

MR. WEIS: I have further questions.

MR. ELLIS: May the witness step down?

THE COURT: Yes. Thank you.

MR. ELLIS: The United States calls Mark Mansfield.

MARK MANSFIELD, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. ELLIS:

Q. What is your name?
A. Mark Frederick Mansfield.

* * *

the witnesses, the students that had been at Nickelby's that night, said that Jamie had been dancing with soldiers and that Miss Snider had been dancing with soldiers.

It was interaction with soldiers. Therefore, the Korean National Police had asked for our assistance in interviewing those individuals, discovering who they were.

Q. While, you were in Korea, did you ever interview Kenzi Snider?

A. I met Miss Snider for just a few moments when I was looking for Joshua or Vince. We only had two names. And I met her for just a couple of moments, I think, to ask her if she remembered anything more about a description.

Q. And that would have been how long after the murder?

A. I recall that being the next day, maybe even the 18th, that morning, but it could have been the next day.

Q. Did you participate in the taking of the statements from Miss Snider in Korea?

A. Oh, absolutely not; not with the KNP nor with the CID.

Q. Okay. So you were on the case for just a few days and then had to go to school.

A. About three days, yes, sir.

Q. And then you came back how long later?

A. About four months, at the end of June. It's almost a three-and-a-half month course. I got back, I think, on June the 18th and I was assigned the case sometime in early August

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get there. I was explaining that to her.

Just some general, nice to meet her again, and not a lot, except to explain that we'd like to talk with her without the presence of her friend.

Q. Okay. How did she feel about that? What did she say about that?

A. Seemed to be fine.

Q. And did you do that?

A. Yes. Yes, we did.

Q. Okay. Who's "we"?

A. I'm sorry. Myself, Special Agent Lee and Miss Snider took the elevator to the second floor, I believe Room 226, which was Special Agent Lee's room, and went into the room.

Inside the room was Special Agent Marc DiVittis, who is the polygrapher that Special Agent Lee had contacted to assist in the case, if needed.

Q. He's a polygrapher with the FBI?

A. That's correct.

Q. Stationed out of Cleveland.

A. Yes, sir.

Q. Okay. And you got into the room?

A. Uh-huh.

Q. And what happened?

A. That—I had already discussed with Special Agent Lee that there was not enough time to get into a full-length interview and to go over these contradictions that I had. So we decided to use that time, if Miss Snider agreed to, as a rapport-building.

There was a lot of questions that I wanted to ask as far as had she remembered anything new, how had she been doing, what was going on at school, what conversations had she had, and what she understood about the case.

That was my intent that night, was just to get to know her a little bit, set her at ease as far as what was going on here, and to make sure she was comfortable, and hoped to see her the next day. I didn't know if her schedule would let her do that.

But the interview started, I think, at about 6:00 that evening, and there just did not seem to be enough time to go over the things that I wanted to talk with her about.

Q. Okay. Did you ask her anything about what she thought should happen to the killer?

A. Yes. I was interested in what her thoughts would be for a number of reasons, but I did ask her that.

Q. How did she respond to that question?

A. Her response was, "Does"—instead of, "What would happen to the killer, what should happen to the killer," the question that I most remember is, "Do you think that the killer would talk to me? Am I the type of person? Am I coming across right? What do you think?"

* * *

Q. Did you ever confront her with any of the inconsistencies on the first night?

A. Absolutely not.

Q. How did that session end?

A. It ended with us asking her if she could speak with us again, explaining that it was getting late and we didn't want to go forward. She said yes. And I think she agreed to come back the next day at 2:45, and also us asking if she would be willing to make a

handwritten statement on what she remembered now. It had been a long time since she'd written anything or talked to anyone about it, to make a handwritten statement about the events that took place in Seoul, Korea.

Q. Did she show up the next day?

A. Yes. Yes, she did.

Q. Was she on time?

A. Yes. Yes, she was.

Q. What do you recall about how she appeared?

A. She appeared finer; jovial, nice.

Q. How was the conversation?

A. Light. She brought ice cream with her for us, homemade ice cream from somewhere local.

We met her again in the lobby, came back up to the room. She had brought the handwritten statement that she had made, and so I was interested in reading that or going over it. And we sat for quite a while eating ice cream, me looking over the

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Also the important part about her saying that she knew what direction Mr.—or Lieutenant Heeney had gone in as he had left the bar.

I did not understand that. From her position in Nickelby's, I wanted to know how could she possibly see what direction he went into.

So I started discussing those issues with her, and the one I primarily remember talking about a great deal is the Lieutenant Heeney and seeing what direction he went into, what direction he went when he left Nickelby's, how could she have known that.

Q. About how long —how much time did you spend talking to her about the inconsistencies you found?

A. Not very long. Based on the two, two and a half hours at the beginning and the time I think I ended, maybe an hour, maybe thirty minutes; sometime in there.

It was not a long time on the inconsistencies, just enough to find out that Miss Snider couldn't answer the questions, could not satisfy the problem that we had there.

Q. What happened next?

A. Special Agent DiVittis had moved over to—close to Miss Snider. I was sitting on the dresser and I think she was sitting on the bed.

And he sat down beside her and he began to tell her that everything in the statements, everything that we had uncovered up to that point was showing us clearly that she had killed Miss Penich. And she listened to that, for approximately five or ten minutes. It seemed like a long time before Miss Snider said anything.

Q. Okay. What did she say when she spoke?

A. She leaned up and she said "You're saying"—she'd kind of been slumped over listening to us. And she leans up and she says, "You're saying that I killed Jamie." And Agent DiVittis was saying, "Yes, that's exactly what we're saying."

And she said "What evidence do you have?" And I don't remember exactly what he said, but "We're not going to get into that right now," whatever.

And then she says, "Do you think I need an attorney" or "Do you think I need a lawyer?" And Agent DiVittis told her that "I can't tell you whether you need an attorney or not. I want us to continue to talk. I can't tell you that."

Q. What happened then?

A. She got up and left. She actually --

Q. What—okay. Go ahead.

A. She actually asked me—I answered—but "Can I leave?"

Q. What did you say to her?

A. I said, "That's fine."

Q. What happened?

A. She got up and left the room.

Q. Okay. And when she left the room, did she close the door?

A. The door automatically closed and locked.

Q. How long was she gone? Well, what was your reaction when she left?

A. We all stood and looked at each other and didn't really know—personally, I was thinking, what am I going to do now? But about ten seconds—and I don't remember—recall anyone saying anything. We were just taken aback that it ended, and we didn't know what to do next.

Q. Ten seconds and then what happens?

A. About ten seconds there's a knock at the door. I walk and I open the door. Miss Snider walks in and she states, "You knew this yesterday," something to that effect. "You knew this yesterday." And she was talking to me.

And I said, you know, "Would you have a seat and talk with us? I want to talk with you." And I think at that point Special Agent DiVittis was asking her the same thing, "Will you talk with us about it?"

Q. Okay. And what did she say about—initially what did, she say about it?

A. Her first comment about it was, "If I did this thing, I don't recall."

Q. Okay. And did DiVittis respond to that?

A. He stated, "Are you willing to—you say you don't recall. Are you willing to talk with me about it?"

Q. What did she say?

A. "Yes." And from that point on, once she said yes, she wanted to talk with us, we moved a chair up for her to sit down in.

Special Agent DiVittis was towards the back of the room, towards the windows. Special Agent Lee and myself were towards the entrance/exitway, kind of sitting in the floor for a lot of the time, and the two of them talked.

Q. How did—how did DiVittis start the conversation?

A. Well, the conversation started with—the only theme, the only thing we had developed that could possibly have caused that much rage out of Miss Snider would have been some type of sexual encounter. That's the only thing we had to go on.

So start with that, to find out is that true, did something like that happen. So we began talking to her about the possibilities of that being the case. And ultimately that's what she began to tell Agent DiVittis happened.

Q. What did she tell him?

A. She stated that they had entered the room and that when they came in, Miss Penich had checked on Anneloes and—to make sure that she was asleep. She said—told Miss Snider to be quiet because she was asleep, and that Miss Penich had gone into the bathroom and had disrobed.

And as soon as I heard that, I understood then the way.

* * *

same ones I had seen in photographs of Miss Snider at Nickelby's the night before the incident, on the 17th of March

Q. Did you smell the clothes?

A. Yes.

Q. What did they smell like?

A. They smelled like laundry detergent.

Q. Were they clean?

A. They appeared to be clean. They smelled clean.

Q. Were they sent to a DNA lab?

A. They were sent to the United States Army Criminal Investigation Laboratory down in Fort Gillem, Georgia.

Q. Okay. Nothing found?

A. Absolutely none.

Q. It's been a year since the—

A. That's correct.

Q. Did you ever find the boots?

A. Never did.

Q. Tell us the whole story about looking for the boots. Apparently you looked in more than one place.

A. Correct. And, again, I was not in Minnesota to know all the places it went, but Miss Snider described that they had moved from their home. And if I have this correct, it may be someone was renting the home. But they had put a lot of the items in storage.

She remembered seeing the boots last on top of a box maybe from a sewing room, something to that effect, but that she felt fairly confident that the boots could be found there in those items.

When the agents went to Minnesota, from what I understand, there was a search done of the storage facility. The boots were not recovered.

The individuals that were living in the house that Miss Snider had last seen the boots were asked if, you know, a search could be made maybe of some items in the attic. I'm not sure. But of the items in the—where storage of the family's items may have been, boots were not found

And one last place, which may have been a family member's home that the boots may have been left, one of those boxes may have been taken. Ultimately, the boots were never recovered.

Q. You looked for some boots at her house too at that time, didn't you?

A. That's correct;

MR. WEIS: I didn't hear the question

MR. ELLIS: I'm sorry

BY MR. ELLIS:

Q. You looked for some boots at her house here too in Huntington.

A. That's correct.

Q. And did you find any?

A. I found two pairs of shoes. On the second day—excuse me—the third day, on February the 6th, I believe, because the boots had not been recovered in Minnesota, I asked Miss Snider, because she'd been going through so much, maybe she'd forgotten, would she give consent for me to go and go back through her apartment and search for the boots.

When got to her house, there were a pair of black Doc Marten brand hiking boots that have the same treadway pattern as the ones from the crime scene; many do. It was a neoprene sole. And there was a pair of sneakers there that had the same.

Miss Snider assured me that those were not the boots she was wearing. But I explained to her that I needed to take them anyway because they matched that treadway pattern. I took them as evidence and took them to USACIL, the Army crime lab, also.

Q. Did you check for DNA on those?

A. Yes.

Q. No DNA?

A. Nothing.

Q. Now, I think that we had more or less finished the interview on the second night.

A. That's correct.

Q. Okay. Will you tell the Court about how long that whole session took.

A. From 2:45 when she arrives until about 6:00 was the time that I was talking with Miss Snider.

After that period of time, I would've guessed to maybe 10:00. From six to ten is when it was truly talking about the confession, exactly what had taken place.

Q. The murder?

A. Correct. And sometime after that, an estimate was the time we were talking about, "Where are these boots? Can we go out to your house," preparing documents, handwritten consent forms to go take Miss Snider to her home to get the clothes and things like that. So a total amount of time, if you were asking, eight or nine, ten total hours.

Q. When you finished with her that night, did you ask to meet with her again?

A. Yes.

Q. And what did Kenzi Snider say?

A. We were at her house and we told her it was late and asked if she would be willing to talk with us the next day, that we really needed to get things down on paper, to make a statement, and she said that she would be.

Q. All right. And what happened?

A. We asked her if she'd meet us at 11:00. Eleven o'clock the next morning, February 6th of 2002, Agent Lee and myself went down to the lobby. Miss Snider was sitting there, had stated she didn't know if we'd want her to come up or not.

Asked her how she was feeling. She said that she had slept well, better than she had in a very long time, and that she was remembering a lot more.

We entered the elevator, came up to the room and begin to take the statement

Q. I'm sorry?

A. We entered the elevator, went up to the room and begin to take the statement.

MR. ELLIS: May I approach, Your Honor?

THE COURT: Yes.

BY MR. ELLIS:

Q. I want to place before you now what I have marked as Government Exhibit 1. Will you take a moment to examine that, please.

Do you recognize Government Exhibit 1?

A. Yes, I do.

Q. What is Government Exhibit 1?

A. Government Exhibit 1 is the handwritten statement that I took from Miss Snider as she told us exactly what happened to Miss Penich and her.

Q. Okay. And that statement, that handwritten statement, Number 1, is a statement that was given to you on actually the third day.

A. That's correct, February the 6th.

Q. Whose handwriting is it in?

A. That is my handwriting.

Q. Do Kenzi Snider's initials appear anywhere on that page?

A. Yes, they do.

Q. Can you tell us how that came to be.

A. At the very end, as we are reviewing the statement together, I asked her to make the initials at the beginning, at the end of the narrative, to make any corrections that needed to be made. And she did

make some additions to the statement, and had her initial those also before signing and swearing to the statement that it's true.

Q. Now, I place before you Government Exhibit 2. Do you recognize it?

A. Yes, I do.

Q. What is it?

A. This is the transcript I made of the handwritten statement.

Q. Okay. When did you make that transcript?

A. Sometime after arriving back into Seoul, korea, after I went back there.

Q. Did you make any mistakes on it?

A. No. There was two sentences left out in the very beginning, based on jet lag, I think. But that was brought to light pretty early on, and I added those statements from here. As far as, you know, verbatim wording, no, absolutely not.

Q. So Government Exhibit 2 is a typewritten transcript of

* * *

person sleeping through that much noise, there was nothing to Contradict that; is that correct?

A. That's correct.

Q. None of—no fingerprints of Miss Snider were found on the body, were they?

A. No.

Q. No DNA of Miss Snider was identified on the body, was it?

A. No.

Q. You had no motive for Ms. Snider to commit the offense, did you?

A. I had an idea of a motive, but nothing clear-cut. I had a motive, but—rephrase your question, if you would, please.

Q. Let's change "an idea of a motive" versus "motive." Anyone ever tell you that Jamie and Kenzi didn't get along?

A. No.

Q. Anyone ever tell you there was any jealousy between the two of them?

A. No.

Q. Anyone ever tell you that Jamie had a large amount of money and Kenzi was really looking for money?

A. Absolutely not.

Q. Anyone ever tell you that there was jealousy between the two of them?

A. No.

Q. Anyone ever tell you that Kenzi or Jamie were aggressive lesbians?

A. Absolutely not.

Q. Anyone ever tell you that Kenzi and Jamie had had a lesbian affair prior to the murder?

A. No.

Q. So when you say that you had an idea of a motive—

A. Uh-huh.

Q. —you mean you had a theory about how she—why she might have done it; isn't that right?

A. That's correct.

Q. And it was just your idea to explain the improbable, wasn't it?

A. if you put it that way, sure, I had to have some idea.

Q. Well, you had to have some idea because people don't do this sort of thing for no reason.

A. That's correct.

Q. And so you start with the hypothesis that she did it. And once you start with that hypothesis; you

make up this motive because you don't have another one, right? Am I correct?

A. Make up this hypothesis?

Q. You start with a hypothesis.

A. Okay. I agree with you.

Q. Okay, that she did it. You need to have a motive. So you make this one up because you don't have another one, right?

A. It's the one that seemed most probable. You're absolutely correct.

Q. Okay. I'm going to go back a little bit. You have been trained as an agent. You testified that you were involved a couple of weeks—a couple of days—I misspoke—a couple of days in this investigation and then you went off for training.

I assume that was training as part of your training as an agent; is that right?

A. Absolutely not, unfortunately.

Q. It wasn't? What was it?

A. That is a basic noncommissioned officer's course. That's the part of my soldier side. In case we go to war, I have to still be a soldier too.

Q. How much training have you had to be a CIB agent?

A. To be a CID agent?

Q. Yeah, how much?

A. Goodness. The original training, just the initial training is 17 weeks. It's very extensive training.

After that—I just graduated from the advanced crime scene course, been to protective service school. I would say a total of maybe six months, if I added everything together.

Q. Okay. Now, you told us six months. You said your advanced training was in crime scene. I assume that crime scene does not include interrogations.

A. That's correct. It doesn't.

Q. You had the basic course. I am sure interrogation is included in the basic course. Is that right?

A. Yes, sir, it was.

Q: Did you have any additional training in interrogation beyond the basic course?

A. Nothing beyond that three weeks, no.

Q. Do you know what training Agent Lee had in interrogations, by the way?

A. I do not, no.

Q. In your training in interrogations in the basic course, what are you taught?

A. There's no name given to it. It's interviews and interrogations. There's so many things that you and I could go into we can't take from any publications or anything. It's the ideas that the Army have on interviewing people.

It's so broad a question, I'm sorry, I don't know if I can answer it.

Q. What, if anything, are you taught about persuading a person who initially denies guilt to admit guilt?

A. Taught that the individual needs to have something to save face with, that no one typically walks into the room, meets with the police and just confesses to what they did. They need to be able to save face. Taught that, in that, a common term used is "theme development," which goes to the idea that you were talking about of me making up this idea of lesbian activity. But there has to be some explanation for it, not just that "I flew into a rage and I'm a bad person"

That is the primary crux of interviewing and interrogating someone, is that there is a theme that someone can hold onto and save face and explain why they did something. That's basically it, other than just practicing with the other students.

Q. Are you taught that you have to make it seem that it's to the person's advantage to confess?

A. You use that. Are you taught that? Somewhere in there it works to make it seem that it's to the advantage.

I personally believe it is to the advantage of a person to confess to something they've done. So if you're asking me, yes. I use that every time. I always think it is, no matter what you've done.

Q. What's to the advantage of a person certainly at least includes lesser punishment. Isn't that a fair statement?

A. It is.

Q. And so that's among the things that you try to convey so the person will choose to change from "I am not guilty" to "I am guilty."

A. I never use punishment, as far as making it lesser or more, unless I've got something to say about something that I know, because it just gets me into trouble when I'm here.

So you're correct in theory, that people do use that to tone down the punishment. But for my investigations, no, because I've seen other agents have trouble with that, promising that "The commander will not punish you if you tell me the truth."

That's a blatant lie. He's probably going to. So I don't use those things I'm sorry, your—

Q. No, no. You really have answered the question.

A. I hope so.

Q. —very well. The first day, there was discussions about what might happen to the perpetrator; isn't that right?

A. That's correct.

Q. And during those discussions about what might happen to the perpetrator; you said that Agent Lee,

not you, Agent Lee voiced at least some doubt in his mind about the ability to extradite; is that right?

A. I never said that.

Q. No, you didn't say that.

A. I read that in-one of the reports that I've seen, but I don't recall doubt of extradition. I think that he said that it's going to be tough and he didn't know for sure what was going to happen. That's what I remember, but—

Q. My memory is at least as fallible as anybody, probably more, but what my notes of what your direct testimony was, was

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Q. This was sort of a confidence let's be friendly kind of session.

A. Break the air. I had been reading Miss Snider's things and in this case so long, I did want to get to know her a little bit and feel out exactly what was going on here, so yes.

Q. And at the end, at least she was of the impression that you people were being friends; isn't that right?

A. We were very friendly, but I always am: so, yes, I hope so.

Q. And the other agents were very friendly too.

A. Yes. We continued, to be the whole time.

Q. To the point that she brought you ice cream the second day.

A. She sure did. She brought ice cream the second day.

Q. The second day, she arrived at 2:45 in the afternoon; is that right?

A. That's, I think, an approximate time. That's correct. I think that's what I have in my report.

Q. And if I were to represent to you that the receipt for the clothing which was seized is signed at 11:30p.m. that evening, would you quarrel with that?

A. 11:30 p.m. that evening.?

Q. Yes.

A. I don't quarrel with that, no, sir.

Q. So you're with her for at least that length of time more than eight hours; is that right?

A. That's correct, yes.

Q. During the first portion of the interview after you're done—

A. Uh-huh.

Q. —after you're done ice creaming, you read over her statement.

A. Uh-huh.

Q. That's when showing her the contradictions began; isn't that right?

A. No.

Q. No?

A. We talked at length about from the time she landed in Korea up to the incident.

Q. This was from her written statement.

A. We were not—I had put down that handwritten statement and was not looking at it. I asked Miss Snider to talk to me about—just face-to-face talk. I wasn't referring to anything; just talking about what had happened, how she had met the other students, from the beginning. That took a long time.

Q. About how long a time do you think that took?

A. Two, two and a half hours is what I'm thinking.

Q. During the time of the interrogation, was anybody taking any notes?

A. During that time? No, sir.

Q. Other than the statement of hers which you wrote out on the third day, did anyone take any notes?

A. Sure. I did. My notes are in the file.

Q. When did you start taking notes?

A. The time is at 8:30 that evening. It says 2030. And I write out, "I killed her." And that was the first—when she stated that and the admissions started coming, I was sitting behind her on the floor and writing.

MR. WEIS: Your Honor, may I have a copy of those notes?

MR. ELLIS: I don't object, Your Honor.

Can you find them?

THE WITNESS: Certainly. It should be part of that copied case file.

MR. ELLIS: Can he step down, Your Honor?

THE COURT: Yes:

MR. ELLIS: Your Honor, could he have a minute to go to the office? It would probably be faster.

THE COURT: Do you want to just take a five-minute break now?

MR. ELLIS: That would be great, Your Honor.

MR. WEIS: We haven't had a mid-morning recess yet. That would be a good idea.

* * *

A. I'll agree with that. Somewhere around there, yes, sir.

Q. Do you know how high or how strong an impact there has to be for there to be a bruise of the depth that was found?

A. Absolutely not.

Q. Without knowing that fact, you cannot say, then, whether the description of how she, Kenzi,

dragged her, Jamie, out of the bathroom is consistent with or inconsistent with the confession, can you?

A. No, I can't.

Q. On the—strike that Prior to the second day of the interrogation, you already had the hypothesis that the motive was—had something to do with a sexual affair or a lesbian affair; isn't that correct?

A. Something like that, yes.

Q. Okay. And you had discussed that with the other agents involved in the interrogation, didn't you?

A. Yes, I had.

Q. That was discussed prior to the first day.

A. Prior to—oh, yes. With Agent Lee? Yes.

Q. And that was discussed with Agent DiVittis.

A. Agent DiVittis?

Q. Yes.

A. Yes.

Q. That was something which was introduced into the interrogation, wasn't it?

A. Introduced into the interrogation?

Q. Yes.

A. Of course.

Q. By you or the other agents.

A. Correct.

Q. And either at—sometime prior to the second day, that is something that you had discussed doing, isn't it, "you" meaning you and the agents.

A. Correct.

Q. When did you discuss doing that?

A. I would think that we discussed it with all three of us—Agent DiVittis and Agent Lee and myself—the first night after Miss Snider left.

I know that we discussed it the second day before she arrived. But for all of us, we could have discussed

it after she left the first night and possibly even before she showed up the first day. I don't recall.

It was part of the ongoing idea of what could cause this much rage. We didn't know, but we were pointing at that.

Q. The scenario—well—that you had in your mind, "you" meaning you and the other agents, had to do something about with remorse too; isn't that right?

A. With being sorry, yes.

Q. Yeah. That was something of the scenario that you had in your plans; isn't that right?

* * *

A. I don't recall anyone talking, I certainly didn't.

A. Did Agent DiVittis?

A. He may have, but I don't recall.

Q. Didn't Agent DiVittis say words to the effect that sometimes when someone has a trauma, that something is very traumatic, sometimes they just push it out of their mind and they don't remember it and repress it?

A. Could have said things, words, to that effect, but maybe not exactly the way you're putting it.

Q. Okay.

A. But that traumatic things, that maybe they don't—they don't want to think about. I don't know. You're asking me to—

Q. Yeah.

A. —remember something—I don't recall that.

Q. Okay. And I want to make sure I understand your answer.

A. Okay.

Q. Do you recall him saying something about maybe when there are traumatic events, people push them out of their minds and they don't want to think about it?

A. He could have quite possibly talked about items like that, but I do not remember any exact words or quotes that I can attribute to him.

Q. And didn't he also say that sometimes they create or have memories which cover those up?

* * *

Q. So before she said she did it, she said, "If I did this, I need to know."

A. Yeah, exactly.

Q. And at that point didn't Agent DiVittis say, "Well, sometimes people repress traumatic memories"?

A. I remember "traumatic memories," but, again, the word "repression" I'm not sure is part of the vocabulary he used there. But, again, "traumatic memories" came up, because this is a traumatic incident. So, yes, to discuss that in that context, most assuredly he most likely did.

Q. You didn't contradict her—well, neither you nor any other agent in your presence contradicted her assertion that she did not remember doing the killing prior, to the interrogation; is that right?

A. Not at all.

Q. And you testified earlier that and I believe—and correct me if my characterization is wrong—that you try to give a suspect a face-saving way to confess; isn't that right?

A. That's correct

Q. So one of—so the face-saving way to, quote, confess, closed quote, would be to say, "Well, people repress memories like this." Isn't that right?

A. Is that a way that it could be said?

Q. Yeah.

A. Sure, it certainly is.

Q. And so that's certainly the common—was consistent with a plan of interrogation.

MR ELLIS: Your Honor, consistent with what plan of interrogation? Any plan?

THE COURT: Was your question, "It could of been said"? Was that what you asked him?

MR. WEIS: My understanding is that he's conceded it could have been said. And let's go back there.

BY MR WEIS:

Q. Could it have been said?

A. Could it have been?

Q. Yes.

A. Of course, the word could have been. I'm trying to be honest and straight forward with what I remember, words.

Q. Sure.

A. But I agree with you a hundred percent. We can move beyond that. I agree with you. It could have been.

Q. And another thing which could have been said is that people create memories to cover it over.

A. It very well could have, yes.

Q. That this was a part of the interrogation that Agent DiVittis was doing.

A. That's right And I apologize for my lack of memory, but it's a stressful thing when you've been on a case that long, and it felt very good for him to be in charge of it. And I don't remember a lot about what was said until 2030 when I started taking notes here, obviously.

Q. So just to sum up on the point, it is a common theme of interrogations to bring up a face-saving way for a person to admit their crime.

A. Yes.

Q. That in this situation, since she had been insisting that things had happened in a way in which

she was not guilty, and she was saying—she started to say, "That's not how I remembered it," it would be certainly consistent with what is done to give a face-saving way for repression and creating a different memory; is that correct?

A. Yes

Q. And while you were not paying attention, you certainly cannot say that that's not how it happened; is that right?

A. I certainly cannot.

Q. Now, this happened, "this" meaning her saying that "I killed her," you said happens at about 8:30; is that right?

A. That's correct.

Q. So she had been, then under questioning for at least five hours, is that right, including the ice—well, five hours and fifteen minutes including the ice cream.

A. Uh-huh.

Q. And it took five hours, approximately, of going over things to have her change from not guilty to guilty; is that

* * *

A. No

Q. Nor was Anneloes, was she?

A. No. I believe Anneloes stayed with Kenzi.

Q. Yes. In all the reports that you've read; is there any mention of any blood observed on Kenzi's pants or her shoes on the 18th?

A. No.

Q. It was a fairly bloody scene of the crime.

A. Fairly bloody.

Q. The perpetrator undoubtedly got blood on her or his pants, shirt, shoes, socks, whatever; is that correct?

A. It's a fair assumption, but based on the cast-off, I cannot say exactly where it would have been. But I agree with you that there's blood there and there should be transfer. I cannot tell you how much there would have been.

Q. When you seized her clothes, you said that you smelled them and they smelled that they'd been washed.

A. That's correct.

Q. As anyone would normally do with the clothes they had, right?

A. I agree.

Q. You still sent them off to the lab.

A. I did.

Q. You sent them off to the lab because you thought it was something which might be productive.

* * *

next.

Q. She was asked, of course, to keep in touch so you'd know where she was.

A. Yes.

Q. And she agreed.

A. That's correct.

Q. And so far as you know, she did that.

A. Yes.

Q. We had—we spent quite a bit of time this morning going over what occurred during the interrogation, and certainly there are parts of it where your memory is not completely clear. That is correct, isn't it?

A. That's correct.

Q. And there are parts where I gather you were not paying real close attention because Agent DiVittis was doing the questioning. That's correct too?

A. In the beginning, yes, that's correct.

Q. And that could be—the problem could be eliminated if you had tape recorded or videotaped the interrogation; isn't that correct?

A. It could have eliminated it, sure.

Q. Sure. And then there would have been a lot less need to go through all this as we are today with witnesses; isn't that right?

A. There would have been a lot less need to go through all of this?

Q. Yes.

A. I assume so, if you had something to watch, sure.

Q. There would be no controversy as to what was said by whom—

A. Right. Correct.

Q. —to whom. Is there any reason why you didn't tape record it?

A. I never tape record. That's the way I was trained. We don't do that.

Let me clarify that. With child interviews, we do do that. I'm sorry. On two occasions I have done it with small children; but in adult interviews, never.

Q. Excuse me, but in my mind, "We've never done it that way before" is not a reason. Do you know what the reason is you've never done it that way before?

A. Maybe I don't have the experience enough to tell you. Two years I've just been trained we don't do it. We do not do it.

Now, if you're asking why the leadership, the senior leadership within the United States CID command doesn't want us doing it, I can't tell you what their thoughts are.

Q. You said that sometimes you do it with small children.

A. That's correct.

Q. Is that a decision which you made on your own or is that a decision which was part of the policy or via a higher officer or what?

A. Decision in training. They train us to do it that way.

Q. Do you know why they train you to do it that way with small children?

A. Basically to not traumatize the child on the stand. If you get a good videotape of what the child has told you during the interview, you don't have to put them through the trauma of testifying on the stand. And that's my training. I have not been to court with the children on the two occasions that I did that, but that's my training, what it's told me.

Q. It wouldn't be to—so there'd be a record to see that there was no undo influence or suggestion made to the children, wouldn't it?

A. It would certainly—it would certainly show that. You're correct there.

Q. When we recessed I had marked for identification Defendant's Exhibit 1, and I have yet to show it to you. So let me show it to you.

A. Yes, sir.

Q. Is that a lab report prepared by the Korean crime lab with the initials NISI?

A. That is correct, from the National Institute of Scientific Investigation. It's a translation prepared by one of our Korean national criminal investigators.

* * *

Q. Separate descriptions of separate blood evidences, right?

A. Right, uh-huh.

Q. And the description of 1 and 38-1 are completely separate, aren't they?

A. The description—

Q. Yeah, on page 1.

A.—are completelyseparate? Both are saying that they're coming from the main entrance of the motel. But I agree with you in that they're typed separately or differently.

Q. One says "door handle," does it not?

A. Let's see. "Inside door handle," correct.

Q. And 38-1 does not specify from where in the main entrance, does it?

A. No, it doesn't.

Q. According to that lab report; there was semen detected on the panties which were found from the floor; isn't that correct?

A. That's' correct.

Q. As a matter of fact, according to that lab report, there was semen contained from the vaginal swiping of the body; isn't that correct?

A. That's correct.

Q. Now, the autopsy report, I understand, there was some controversy about translation—

A. Uh-huh,

Q. —and it initially had it translated as semen, but then that was determined to be erroneous; is that right?

A. It was originally translated as semen. The test was positive, but it was erroneous. It was negative.

Q. And so that the retranslated version of that report was changed; isn't that correct?

A. That's correct.

Q. The translated version of this laboratory report, however, was not changed, was it?

A. No. No, it wasn't.

Q. Because no translation error was detected; isn't that correct?

A. That's correct.

Q. In the lab report, it says that there was a type A hair found under the victim's head; is that correct?

A. Which reference are you making to the report, under what entry or evidence number?

Q. Okay. On Evidence Number 13 on page 2.

A. "Eleven hairs collected from the location under the victim's head"? Is that what, you're referring to?

Q. Right

A. Okay

Q. And if you turn to page 4, Hair and Pubic Hair.

A. Yes, sir

Q. It says Evidence 11 consists of a hair with blood type A and eight hairs with blood type B and a pubic hair with blood type B; is that right?

A. Yes.

Q. Do you know what blood type Jamie was?

A. B.

Q. Do you know what blood type Kenzi is?

A. B.

Q. Is Anneloes type A?

A. She's O. She's blood type O.

Q. So that's a person other than Anneloes, Kenzi and Jamie; is that right?

A. The hair belongs to someone else, yes, sir.

MR. WEIS: Now, Your Honor, we would move the admission of Defendant's Exhibit l.

MR. ELLIS: No objection. No objection. That's the lab report?

THE COURT: It will be admitted.

MR. WEIS: Yes, that's the lab report.

MR. ELLIS: No objection.

THE COURT: It will be admitted. Incidentally, I guess we are really not admitting the exhibits that

the Government has put in, are we, since they are already a part of the record? Is that right?

MR ELLIS: 1 and 2 are included in the packet, yes, Your Honor

THE COURT: All right.

BY MR. WEIS:

Q. You're familiar that there were several interviews of the woman who was apparently at the front desk, a Chong Sun Pak?

A. I'm very familiar, yes, sir.

Q. And she stated that she saw a man leaving Room 103 with blood on his pants legs around 3:30 a.m.; isn't that right?

A. That is what she stated, yes

Q. And she stated that on, I think, more than one interview; isn't that correct?

A. She stated it on the second interview, five days after the incident, for the first time.

Q. The first interview, she said that she was not at the front desk, her husband was isn't that right?

A. That's correct.

Q. And her husband said that he saw that man; isn't that right?

A. That's correct.

Q. And it turned out that her husband, in fact, was not on the front desk, but she was; isn't that right?

A. That's correct.

Q. And the husband said, "I want to spare my wife the trauma of going through this, so I said I was at the front desk, and I was repeating what she told me." Is that right?

A. He originally said that he wanted to not have her caught up in any dealings with the KNP because

of work. That was the primary reason that I was given.

Q. Right.

A. So my explanation—but, yeah. It's a little different than what you just said.

Q. Okay. And I apologize.

A. No, it's okay.

Q. All right. Now, she, in fact, identified a person, saying she was about 90 percent sure of that person; is that right?

A. That's correct.

Q. And that person was questioned and alibi witnesses were questioned and, so far as you knew the alibi checked out.

A. That's correct.

Q. She never said she did not see a man leaving with blood on the pants, did she?

A. Never said—no, she wasn't questioned about it in the first statement, but she did not give the information in the first statement. But I agree with you. She never changed her statement after that, that she saw someone leaving the room.

Q. Are you also familiar with the interviews of a woman named Cheong (phonetic) Yi?

A. Very familiar, yes.

Q. She said that she saw a man loitering around Room 103 at 4:20 in the a.m. on the 18th; isn't that right?

A. That is correct.

Q. You also know that there was one of these students—Keti Peltooma was interviewed; isn't that right?

A. That's correct.

Q. As a matter of fact, in one of your reports, you cite some of the sounds that she heard which would

be consistent with Jamie being assaulted isn't that right?

A. That's correct.

Q. Jamie (sic) also said, though, that she heard male voices at that time, didn't she?

A. She did, yes.

Q. She said she heard a male voice say, "But you are here now."

A. Uh-huh.

Q. Then she heard the stomping sounds, then the female moaning-in-pain sounds; is that correct?

A. Uh-huh; yes.

Q. Then a male voice, "Let's go."

A. Uh-huh.

Q. And then footsteps she thinks of more than one person.

A. That's correct.

Q. So she at least in time correlates male voices with the sounds; isn't that correct?

A. At least in time she correlates, yes.

Q. Now, you talked about the tub and the experiments as, to

* * *

A. Specific training, no.

Q. Now, you said that you were recommended to legate to be the agent who would help conduct this interrogation. By whom were you recommended, if you know?

A. The polygraph unit, headquarters.

Q. Headquarters in Washington?

A. Yes.

Q. You knew, did you not, that political pressure had been placed on the Korean President by Senator Specter to solve this case; isn't that right?

You knew that prior to the interrogation.

A. That's why I'm hesitating. I'm trying to think exactly when I knew how intense it was.

Prior to it, no, because I remember making the comment afterwards, "Boy, I'm glad I didn't know that beforehand"

Q. You did a report on a polygraph form, didn't you?

A. Yes, I did.

Q. And in that report on the polygraph form, you said in the introductory paragraph that political pressure had been put on the Korean President, among others, to solve the case; isn't that right?

A. That's correct.

Q. So when you're writing the report, you have it chronologically that the political pressure came first; isn't that right?

A. Well, it wouldn't make sense to put that afterwards.

Q. It wouldn't make sense to say, "I learned that afterwards?

A. I didn't put I learned it, but I do not type up the report before I get—I don't type up the introduction before I get there. I type the report up after, after the conclusion of the interview.

MR. WEIS: Could I have a moment, Your Honor?

BY MR WEIS:

Q. Your report was typed on February 7th, wasn't it?

A. The date of the report is February 7th, yes.

Q. So that's immediately after the statements had been taken

A. I don't type it immediately after, but—

Q. But that—the date it's dated is the day after her written statement.

A. If those are the dates, yes.

Q. Okay. So by February 7th you certainly knew about the political pressure.

A. Yes.

Q. And do you mean to tell me that people just sprung this on you, "Hey, this was a lot of political pressure case"?

A. I wouldn't say spring it on me, no.

Q. So you weren't surprised to hear that?

A. Well, if you had asked me prior to the evening of the 7th, "Do you know there was political pressure by Arlen Specter," I would have said no.

Q. Did you know this was a high priority case for the agents, there?

A. I'd say yes.

Q. And certainly the superiors who authorized your being part of the team would have known that prior to authorizing you, wouldn't they? "That" meaning that there was a lot of political pressure, whether or not they specifically knew about Senator Specter.

A. If it was told to them, I would guess. But I do not know.

Q. You've testified that you were trained in interrogation techniques. Part of the interrogation techniques that you learned is to try to build an atmosphere of trust between you and the person whom you are interrogating; is that right?

A. If you're speaking of rapport, yes.

Q. Would you quibble with the word "trust"? You used a different word. You used "rapport." It's trust also, isn't it?

A. Well, yeah. Okay. If you want to say "trust," we can say "trust."

Q. And that is so that the person who you're dealing with thinks that you're being honest and straight with them; isn't that right?

* * *

or threats to obtain a confession. You cannot coerce a confession. So you can't—I mean you can make them feel safe but you can't tell them, "Look, you're going to walk out of here" And you can't tell them, "You're never going to be arrested." You can't tell them things that you don't know won't happen.

Q. At the first day of questioning of Kenzi, there was discussion about what might happen to the person who killed Jamie, wasn't there?

A. There was some discussion, yes.

Q. Didn't Agent Lee state words to the effect that because they both were Americans, extradition might be difficult or complex or something of that nature?

A. Yeah.

Q. During that first day didn't Agent Lee say something to the effect of a serviceman who had killed a prostitute originally got eight years and then it was reduced to six years after appeal?

A. I don't recall the appeal portion of that statement, but it was a short period of time that you might think someone would get for killing someone.

Q. Did you say anything to Agent Lee that, "You shouldn't say things like that"?

A. I don't see a need not to say things like that.

Q. So in your mind that's an appropriate thing to say to a

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I mean that's what—that's the whole idea of what a theme is.

Q. And that's something you did here in this case.

A. Yes, I did do this, but not—

Q. Not the first day.

A. Not the first day.

Q. Going to the second day—and you were present for the entire time; is that right?

A. That is correct.

Q. She arrived at about 2:45.

A. Roughly, yes.

Q. Were you keeping a log of what was happening?

A. No.

Q. Were you keeping notes of what was happening?

A. No

Q. At 2:45 you ate ice cream and, I assume; engaged in small talk during that period of time.

A. Yes.

Q. How long did that take?

A. I don't—maybe 15 minutes.

Q. Okay. So at 3:00 you begin—and I'll use the word "questioning her," trying to choose a neutral term. Is that correct?

A. Again, I was not engaged in the beginning of it, no.

Q. All right. One of the agents began.

* * *

A. I know I made a response to that, but I don't know if I made it at that point or when she came back in the room.

Q. What was the response?

A. "Not on purpose."

"Not, on purpose."

Q. The reason for giving that response was to make it easier for her to admit, isn't it?

A. That's the beginning of a theme development case.

Q. And to make it clear, a part of the theme development is to make it easy for a person to admit.

A. Minimize the act is basically—that's probably the best way to answer that.

Q. Didn't she say—well, what did she say after that?

A. Nothing. She left the room.

Q. When she came back.

A. Oh. At that point she may have said either, "I can't believe you think I killed her" or "You think I killed her," and, again, "Not on purpose."

Q. Right. And my question—my last question had been, what was her reaction to your statement "Not on purpose"?

A. There was no true—no reaction, really, to it.

Q. There was no admission at that point.

A. No. No. She didn't automatically say, "Yes, I killed her." No.

Q. And what did you next confront her with or say to her?

A. I said, "It's important that we talk about this," And then, as I say, that is when I go into development there. "A lot of things could have happened here."

But before we really even got—and then it was just more of that, you know. "So let's talk about it. Let's explain what happened. It's important for you to get out what happened so somebody doesn't tell you what happened."

And that's really when you go into it, because as you confront someone—and basically she left the room to do this. Most people, their mind starts working and it's, you know, "Now they've confronted me. They know. What am I going to do?"

Q. When you said that that's when you started the theme development, that's when you started developing ways to make it easier for her to admit; isn't that right?

A. Well, not—I mean you don't just start firing. You know, you want them—you want their attention You want them—again, "Hey, you know, I know you did it. We need to talk about it. It's important we talk about it. Now, there are a lot of reasons people do things. So what's important is to find out what happened. And your story has to get out there. We have to explain to people that you're not a terrible person."

Again, that in itself is a theme, to say, "You're not a terrible person." So specifically when you're saying one theme or another, you know, that you can call that a theme if you want.

Q. And at some point she said, "That's not how I remember it," or words to that effect, meaning she did not remember that she had—

A. Oh, no, her statement was, "If I killed her, I don't remember"

Q. And your reaction was?

A. "We need to talk about it." You mean my verbal reaction or my—

Q. Yes.

A. Oh. "Well, let's talk about it."

Q. And you started talking about why that might not be how she remembered it, didn't you?

A. I'm sorry?

Q. What you started talking about, the theme you started talking about when she said, "That's not how I remembered it" had to do with why—

A. No, she did not say, "That's not how I remember it." She said, "If I killed her, I don't remember it."

Q. Okay. And you started talking about why she might not remember it, didn't you?

A. That would not be a true rendition of that.

Q. What did you talk about?

A. Started talking about a lot of things people—there are a lot of reasons people do the things that they do. There are a lot of—and, again, you start into the theme development. And I don't specifically say, "There are reasons you don't remember."

Q. What theme did you start to develop?

A. It was a broad-based theme at first, and then went into, "If you want my help, I can help you. Now, we need to talk about this. So it's up to you whether you want to talk about this or not."

Q. And at this point, that was still not how she remembered it, was it?

A. Did she still deny that she killed her?

Q. Yes.

A. Yes.

Q. So her memory at that point and as she verbalized it to you was, "I don't remember killing Jamie."

A. No, she said, "If I killed her, I don't remember it."

Q. Okay. And what did you start developing with her as a result of that?

A. After the broad-based—if you're talking about going into whether it's emotional or factual, one of the themes that I used was, you know, "There are ways to work through it. We can go through the actions or how you felt during that evening. One may be tougher than the other. Which do you want to do? Do you want the tougher or the easier?"

And she decided, "Well, let's go easy first." So we started talking about the actions of that night, you know, "Where were you"—and I jumped around, you know. "Okay. You're back at the hotel. Then you're in your room. You're back down the hall. Let's go back to the bar."

And then from there we went into, "Okay. How did you feel when you saw this," or "How did you feel when you were walking back to the hotel," and back and forth in that aspect, and then talking about, "There are a lot of things that happen to people that cause them to do things they never think they would ever do. Alcohol sometimes has a play in people's judgment," and these type of things.

Q. And she still was denying it, wasn't she?

A. No, she was listening. It became a monologue.

Q. Became a monologue?

A. Yes.

Q. Okay. I just did not understand your last word. But she was not admitting it, was she?

A. She did not stand up and say, "Hey, I did it" when I'm talking to her. She did eventually.

Q. We know she did eventually.

A. Right.

Q. What I'm trying to do is, you know, get to the steps that got us there, from a person who's saying, "That's not how I remember it" to a person who says, "I killed her," right?

A: Again

Q: She brought up, I gather; the theme of memory, didn't she?

A: She said, "If I killed her, I don't remember it." So I put that in the back of my mind. "Well, you know, let's talk about it so you can remember it."

Q: So the idea was rather than to confront her, "You are lying," the idea was, "Let's help you remember it." Is that fair?

A: Oh, confront and say, "No, you're a liar. You remember it, right," I didn't go straight to her and say, "You're lying because I know you remember." No, I did not do that.

Q: Your goal was to help her remember it; isn't that right?

A: No, my goal was to help her find a way to tell me.

Q: And you try to make it as easy for a person to find a way to tell you as is possible; isn't that right?

A: Looking for the face-saving way, yes.

Q: And a face-saving way is to tell a person that, "Well, maybe this is a traumatic event which you repressed." Isn't that right?

A: Is that a face-saving way?

Q: Yes.

A: That could be used, I guess. I don't know

Q: That way you let—tell a person, "Well, you hadn't really been lying to us before, but now we're going to get you

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that statement being made at that time but—not specifically. Was that the first time I heard that? No.

Q: If I represented that what I was reading from was Agent Mansfield's handwritten notes of the interrogation, would you have any reason to disagree with my representation?

A: No, I would not. My understanding is he wrote those as we were talking.

Q: We then have a case, a situation, where people's—clearly people's memories of exactly what happened in the interrogation differ; isn't that right?

A: Well, I think your presentation was did I want to know why she was angry, and I said no. Did she make that statement? I believe I said no. So—

Q: You're going back too far in my presentation.

A: Oh, I'm sorry.

Q: You'll concede, then, that, as is reflected by these notes, your memory prior to reading the notes

was a little different from what these notes reflect; isn't that right?

A: Yes, I do not remember that statement being made.

Q: And if—this interview was not tape recorded, was it?

A: No, it was not

Q: And it wasn't videotaped, was it?

A: No, it was not

Q: Was that your decision?

A: The Bureau doesn't tape.

Q: So that was the Bureau's decision

A: All right.

Q: Do you know why they make that decision.

A: I would not be able to cite why they make that decision.

Q: Had they taped this interview, there would be no question as to who said what to whom during the interview, would there?

A: No, if it's written on that paper that you're talking about, then that's what was said.

Q: That's not my question. My question is, if the Bureau taped the interview, then there would be no question as to—

A: Oh, if you had a tape of that interview, yes, there would be no question.

Q: Does that create a problem for you?

A: No

Q: But it does for the Bureau.

A: What? Does it create a problem for me to have a tape present or does it—

Q: Again, let's make sure we understand. Would you personally feel there was a problem with taping the entire interview?

A: I would not want to tape the interview, if that's what you're asking. My opinion, I would not want to tape the interview

Q: Why not?

A: I don't believe it's necessary. I think that the victim's family hearing what's going on during the interrogation would be very hard on them. And I don't think—as I say, I don't think it's necessary.

Q: So your—even though concededly people's memories of the interrogation are going to differ and what is said during the interrogation may be very important, you don't think an interrogation should be videotaped or audiotaped because a victim's family might hear verbatim what happened.

A: You're asking my opinion?

Q: Yes

A: Yes

Q: And that's the only reason?

A: I don't think people would understand an interrogation. My opinion is that they wouldn't understand what's going on. So, you know, why put the family through that? Why let people look at something and get confused over something when what comes out of it is, "I killed her. This is how I killed her," and they've signed a statement, "This statement is true and accurate. I killed her."

Now, whether it was important that you're saying I did not recall that, it was not important to me whether she's saying, "I killed her because I don't like blue birds" or "I did it for this reason" or "I did it for that." That's not important.

What's important is she killed her. So that's what sticks in my mind, how she describes what happened, how she describes striking her in the face and how she did it, showing me spontaneously how she did.

That sticks in my mind. Those things are important to me.

Do I recall her specifically saying, "She's touching my button. I remember being under stairs. I don't want her looking at me that way," I don't recall the preface to that. I recall her saying, "I don't want her looking at me that way."

I thought of that when she stated that as, "She won't accept me, as—when I'm naked. I don't want her to see me naked." That's—when she made that statement, that's what I perceived. Just as when she said, "I feel like I'm five," I perceived she thought I was talking to her as an authoritative figure as her father. And I missed that one too.

So do I think it's important to tape so that—whether that statement was made or not, no, I don't, because of the other consequences with it where you can hurt family and confuse people.

Q: Don't you think it's important that courts and the public see how a person is persuaded to go from saying, "I am not guilty" to "I am guilty"?

MR. WRIGHT: Your Honor, I object; asked and answered.

MR. WEIS: It has not been asked and answered.

MR WRIGHT: I don't see the relevance.

THE COURT: Well, I don't know whether it has been asked. I'll allow him to answer.

THE WITNESS: Do I think it's important—

BY MR WEIS:

Q: Yes.
A: —for the courts to know what's going on?
Q: Yes.

A: I'm telling you what's going on, so the Court does know what went on in that room.

Q: What specific training have you had in order to avoid false confessions, if any?

A: To make—you mean—okay. How do you make sure it's not a false confession?

Q: Yes. What specific information—

A: You have to make sure there's detail. You have to make sure that the person is telling you things that they know. You have to be able to corroborate those things. That will tell you if it's true or not.

Q: And that's it?

A: That's the extent of my training.

MR. WEIS: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. WRIGHT:

Q: Agent DiVittis, did Miss Snider provide details about how

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five or ten seconds. I knocked to come back in. They let me in. And at that time I said, "Do I need a lawyer?"

And it was DiVittis who said, "That would just complicate things." He said, "We can't say that you fully cooperated if you get a lawyer." He said, "I just want to ask you some questions. We can do this the easy way or the hard way." And he said, "The easy way is through emotions and the hard way is through actions."

Q: Let me interrupt you there. When you came back into the room, obviously initially you're standing.

A: Yes.

Q: What happens to the seating arrangement?

A: The seating arrangement, DiVittis moved over—at this time when he asked, "Well, there's the hard way and the easy way," he said, "Do you want to do this?" And I said, "Yes, if it will prove to you that I didn't do it."

So that's when he motioned. They brought the easy chair over. In between is the dresser, I guess, to the left of me, and then the bed was to the right, and the easy chair was kind of in the middle of it, crammed in there. And DiVittis was on the other side by the window on the chair that I had been sitting in earlier. And Seung Lee and Mansfield were behind me somewhere.

Q: Okay. So you said you wanted to go through the easy way, which he said was through emotions.

* * *

Q: Then what happened? Did they leave and you go to bed?

A: I didn't sleep.

Q: Okay. What did you—you went to bed.

A: Yes. I was lying in the bed.

Q: All right. And what happened when you went to bed?

A: I was running through what I had told them, and there were gaps that I couldn't explain, things that didn't feel real.

I kept basically doing the same thing that DiVittis was doing. I would ask myself questions trying to explain something, try to fight through a cloud, try to make it more—something more real or something that I've experienced, I guess.

And so then when I went and met with them at about eleven, the next morning—

THE COURT: Mr. Weis—excuse me—it's about 5:30. Would this be a good place where we could recess for the evening do you think?

MR WEIS: It seems like a logical break, yes Your Honor.

THE COURT: All right. You may step down.

We will recess until in the morning at 9:30. Is that all right?

MR. ELLIS: 9:30 is fine.

MR WEIS: 9:30—I think you said 9:30. That's

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I step back from the door. Jeroen goes to check in Room 101 to see if Elvita knows—excuse me—if Elvita knows where Jamie is. She doesn't. But she comes back, and we're standing in—Room 103 to 104, we walk down and there's a corner and there's another corner and there's a hallway just right there. And I'm standing there and Anne—excuse me—Elvita and I are hugging, trying to figure out what's going on.

At some point Keti, Tuomas and Jeroen walk down to the police station to get them, because we can't get the police any other way. And they come back and they usher us all into Room 102.

Q: And who is "they"?

A: The Korean police.

Q: What do the Korean police do?

A: They keep us in Room 102

Q: While you're in Room 102 the next morning, what pair of pants are you wearing?

A: My green pants.

Q: What pair of pants were you wearing when you were at Nickelby's dancing the night before?

A: My green pants.

Q: Okay. Go ahead.

A: So we're in Room 102. They're trying to figure out who the body is, they're saying if we know who it might be. I

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eliciting the information about subject "X" in the proper way, which is to elicit the confession in as close to a free narrative as possible, the interrogator rather tries to get the person to agree to those things about the crime scene that they know, they simultaneously contaminate the person and therefore elicit a story that will be tailor-made to fit the facts of the crime

A: And if that's done in combination with visualization, once the person is given the problem, is told "X" happened, initially doesn't remember "X," visualizes "X" occurring, the person then can report back, "Ah-hah, I now remember having done 'X.'"

So these are—this is the basic outline for how modern interrogation works and the pitfalls that can occur if psychologically coercive motivators are introduced and if someone's memory of—someone's confidence in their memory is undercut. And to make matters worse, if they also visualize scenes of the crime, they can become sincerely convinced that they've probably committed the crime. And that's it.

Q: I, of course, retained you with regard to Kenzi Snider's particular confession, not for the purposes of the presentation on the general theory.

Did you collect any information from Kenzi and from other sources about this interrogation prior to the hearing which began yesterday?

A: Yes

Q: And you then, with that, produced a report; is that correct?

A: That's correct.

Q: I'd like this marked as D3.

I'd show you what has been marked for identification as Defendant's Exhibit 3. Is this the report which you prepared in connection with this case?

A: Yep, it is;

MR. WEIS: Your Honor, I'd move the admission of D3.

MR. ELLIS: Subject to our, you know, our position that this is not competent testimony, we'll allow it to come in it's already in the record anyway.

THE COURT: All right. It will be admitted.

BY MR WEIS:

Q: What information did you consider in preparing D3?

A: First; a series of statements; the statement to Korean police on 3/18/01, statement, to Korean police on 3/19/01, statement to the Korean police on 3/21/01, written report of the events of 3/17 and 3/18/01 done on 2/5/02, notes of a statement made to Agent Mansfield on 2/6/02, report of a statement to the FBI on 3/4/02, report of a statement to the FBI on 5/23/01, then Kenzi Snider's account of the interrogation, a written report of the events of the interrogation of 2/4, 5 and 6/02, the written account being done on 4/4/02, the transcript of the interview of Kenzi Snider with Mr. Weis, a transcript—ultimately a transcript of my interview of Kenzi Snider, the interrogators' accounts of the interrogation, the report by Special Agent Lee and Special Agent DiVittis of 2/7/02, a report by Special Agent DiVittis also of 2/7/02.

There were other documents involving the collection of 11 Korean police reports pertaining to

the investigation and interviews of various individuals, a collection of five Department of the Army CID investigation reports, collection of five reports relating to the autopsy, collection of 18 newspaper stories from various papers, blood donor report re: Kenzi Snider, the extradition request with its appendices, and then there was the interview I did of Miss Snider on August 6th, the transcript of which was ultimately added to this report.

Q: Okay. And as a result of your review of all of the materials that you reviewed, did you come to a conclusion?

A: Yes.

Q: And what was that conclusion?

A: I came to the conclusion that the description of the interrogation given by Miss Snider fit the model that I've just described, that it involved the use of what I would call psychologically coercive motivators and that Miss Snider described visualizing scenes involving herself in the killing of Miss Penich that occurred within the context of the interrogation, that these visualizations which were classified as memories, and I would classify as, in all likelihood, pseudomemories, were responsive to the events of the interrogation.

Q: Can you be a bit more specific in describing how you believe that process went on from the first interview in the hotel room to the second day to the third day.

A: Well, the first—let me back up to the first day. The first day was, I think by agreement, a rapport-building day. It appeared to be a successful rapport-building.

The second day began the process of confronting Miss Snider with pieces of information that were said to be indications, if not evidence that she was not

telling the truth and therefore that she is probably the perpetrator.

Some of those claims were about contradictions in her story which seemed not to have a lot to do, if anything to do, with the actual crime, such as whether or not she encountered a particular individual on the way from the bar back to the hotel, but some of them seemed to be related to things more central to the crime, such as whether or not there was water turned on in the shower, which directly contradicted her account of Miss Penich being—preparing herself to take a shower, the contradiction that was claimed that her roommate awoke when she returned to the room and that there was only one event in which she returned to the room rather than the two that she discussed, and third, the inability to hear what was going on in the shower from the outside door.

Q Were there any motivators introduced during the two-day—or three-day process, rather?

A: The motivators that would have been introduced involved at least the discussion of the difficulty, depending on whose version one accepts on that, either the difficulty or the virtual impossibility of extradition, and then the low level of punishment for the crime, should there be any prosecution for the crime, described by Miss Penich (sic).

Obviously there's a difference in the accounts of the strength of the motivators that were introduced. In Miss Penich's—I'm sorry—in Miss Snider's—forgive me—Miss Snider's account, the motivators were quite strong and quite clearly used.

And in the accounts, so far as they were talked about by the agents, there was mention of extradition and the possibility that extradition would not be possible, I think. But—and Miss Snider reports that

she was convinced that she would face no punishment if she agreed to the crime. That's a powerful motivator.

Then the other—well, that's the motivators.

Q: That's the motivator. Okay. Now, was there any evidence of introduction of a morally less culpable, perhaps morally less repugnant version of the offense?

A: Yeah. There was a scenario formatted for the crime that involved some kind of sexual pani or panic produced by a sexual overture. Again, that's a scenario certainly not uncommon. I have certainly seen it used before.

It's a way of suggesting that the crime was at least responsive to an emotional panic rather than an intent to do damage. It was almost an accident in the—well, it was almost an accident.

So there's clearly a formatting of a version of the crime that is less—perhaps less legally serious, certainly less heinous.

Q: And in your explanation of the typical interrogation process, you mentioned an individual being interrogated claiming "That's not the way I remembered it, I don't have a memory," or words to that effect.

Did anything happen here in this interrogation that fits in with the studies and the model which you presented to us earlier?

A: In the account of the interrogation up to the completion of the homework assignment, the beginning of the second day, Miss Snider reports that she has no memory of having done anything improper. And by the end of the second day, she is describing visualizations—which she describes as visualizations of her committing the crime.

* * *

processes; isn't that correct?

A: Yes.

Q: And you've become familiar with the literature in the field—where and the literature I'm referring to is that which advises or instructs law enforcement officers how to conduct interrogations, is that correct?

A: Yes

Q: Comparing with what Kenzi Snider described as happening to what you've seen happening both through your empirical research and your study of the literature to which I just referred, is her version of what occurred consistent or inconsistent with what you've studied both empirically and through those readings?

A: Well, it's consistent up to the point of whether or not psychologically coercive motivators were employed. Other than that, it's not an extraordinary interrogation.

The rapport-building, the use of the contradictions suggesting that she committed the crime are rather ordinary tools.

The visualization, the overcoming of a claim of "I don't have memory in one way or another" is also an ordinary thing to do.

I'm not aware of anything suggesting that the interrogators tried to get her to imagine the scenes. While they put pressure on her to come up with answers, they did not

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It's been testified, admitted, that Kenzi Snider, then, once again on March 1st admitted to Agent—an agent of the FBI killing Kenzi Snider.

How does that fit in with the creation of a pseudomemory as you described here?

A: Well, a pseudomemory as I've described here is unusual because or—rather, a persuaded statement

based on a sincerely believed misidentification of an event as a real memory is very extraordinary. But if someone comes to believe that, then they're liable to continue acting on that until something comes along to change their beliefs.

The system can be disturbed if they're given information that convinces them that what they have now accepted as memory is, in fact, an artifact. But in a situation in which someone believes that they are going to minimize their punishment by continuing to hold to the story that they've adopted, if they've been gotten to adopt the story and if they have a basis for a sincere but not necessarily absolute belief in it, that they would continue to repeat that is certainly not surprising given their perceptions of their situation and what the future holds.

They're continuing to act on the same things that led them to first say, "I did it."

Q: From all you've heard now, do you have an opinion on the reliability of Kenzi's confessions?

A: My opinion would be that this is a deeply troubling statement because it contains elements that suggest that it could be a false confession, that suggest strongly that it could be a false confession, and there seems to be a lack of independent corroboration of her having perpetrated the crime.

Ultimately, the corroboration is the key issue. So I don't know how to conclude a particular level of reliability. All I can say is it's deeply troubling and I can't find basis for having any significant confidence in it.

MR WEIS: I have no further questions

THE COURT: Since it is noon, we'll recess, then, until 1:30.

MR ELLIS: Thank you, Your Honor

(Lunch recess from 12:07 p.m. to 1:31 p.m.)

AFTERNOON SESSION

THE COURT: All right

CROSS EXAMINATION

BY MR ELLIS:

Q: Professor Ofshe, do you have your report in front of you—

A: Yes, I do.

Q: —the report that you did in this case?

A: Yes.

Q: Would you turn to page 2.

With me?

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